MISSISSIPPI LAW JOURNAL

THE EARLY CHILDHOOD EDUCATION ACT OF 1971: PUBLIC KINDERGARTENS FOR MISSISSIPPI

Dr. Robert W. Plants, Dr. Peggy Emerson and Earl Fortenberry, Jr.

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Bill Joyner and John Maxey

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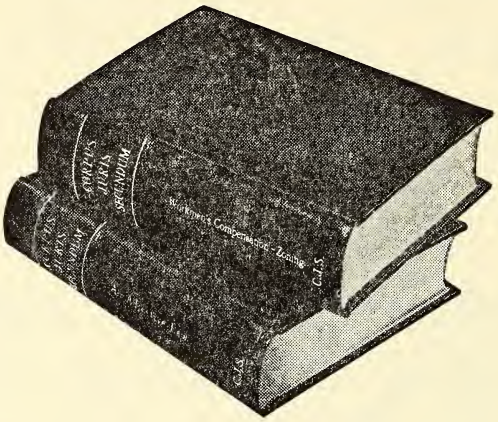

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THE EARLY CHILDHOOD EDUCATION ACT OF 1971: PUBLIC KINDERGARTENS FOR MISSISSIPPI

Dr. Robert W. Plants, Dr. Peggy Emerson,** and Earl Fortenberry, Jr.****

I. Introduction

For the past several years many individuals and interested groups of Mississippians[1] have been actively concerned with the welfare of kindergarten age children. Considerable local effort has resulted in the establishment of nursery schools and kindergartens. Federal funds have aided in creating local and multi-county headstart child development centers.[2]

Although there have been many successes, there have also been many failures. Where local institutional support and federal funds were available, a few cities and school systems[3] have been able to support and staff community kindergarten programs. Other agencies, operating outside—or as appendages to—governmental or institutional bodies, have tended to come and go as federal or local monies were available. Private nurseries and kindergartens, unless church supported, have historically been understaffed. The teacher-pupil ratio needed to provide educated adult supervision of three, four, and five-year-old children eliminates the profit motive in an acceptable preschool program.

Perhaps it has been the questions that surrounded the objectives of the early headstart program, or uncertainty as to the form an acceptable kindergarten program should take that has made institutional Mississippi slow to take enabling steps that would allow its educators the opportunity to provide state supported kindergartens as part of the public schools.

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* Chairman, Dep't of Elementary Education, University of Mississippi.

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*** Member of Editorial Board, Mississippi Law Journal.

[1] Mississippians for Public Education, League of Women Voters, American Association of University Women, and many church groups throughout almost every city in the state.

[2] *E.g.*, Lift, Inc., Tupelo, Mississippi; ICS Headstart program of Marshall and Lafayette Counties.

[3] Title I ESEA Program, Meridian Public Schools and the Kindergarten and Title III programs of the Natchez School System. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

The purpose of this paper is to present a discussion of kindergarten education in the public schools of Mississippi. The impetus for this discussion originated in the introduction of the Early Childhood Education Act in the Mississippi Legislature. This Act provides for state assistance to those school districts which desire to create kindergarten units in the public schools of that district.

In this discussion, attention is first given the programs and projects in Mississippi which have been directed toward education of kindergarten age children. Next, consideration is given those existing Mississippi statutes which concern public kindergarten education. Third, a brief summary of kindergarten programs in other states is offered. Finally, the provisions of the Early Childhood Education Act of 1971 are presented.

II. Preschool Education in Mississippi

A. Institutions of Higher Learning

From the first "crash hands-off" head start program initiated in Mississippi to the head start orientation programs conducted during the months of May and June of 1966 for the Tupelo, Batesville, and Charleston communities by the University of Mississippi, there was a time of turmoil and educational trial. A few chronologically listed events may serve to suggest that throughout the uncertain and undulating educational scene, then and now, a pattern of institutional involvement was and is emerging.

The University of Mississippi conducted an on-campus eight-week OEO training session for Head Start teachers during July and August of 1966. In 1967 the Southern Education Foundation awarded the University of Mississippi thirty fellowships for graduate work in Early Childhood Education. These programs were followed by the present three-year Title V grant (1968-1971) secured by the University to develop a non-terminal degree Early Elementary Education program.

The University of Southern Mississippi used a Triple T—Trainers of Teachers of Teachers—grant to strengthen their kindergarten program by the addition of laboratory components. Jackson State College and Mississippi State College for Women offer classes and laboratory experiences for kindergarten teachers. In 1967, in an attempt to develop a coordinated effort in the state, funds from the National Institute for Advanced Study in Teaching Disadvantaged Youth and the Mississippi Head Start Coordinating Council were utilized to establish a state-wide advisory committee for the pre-elementary programs. Dr. S. A. Moorhead, Dean of the School of Education of the University of Mississippi, was appointed chairman of the group.

The certification department of the Mississippi State Department of Education revised the requirements for the elementary teaching certificate to encompass a K-3 program which requires three semester hours of course work in early childhood education by September of 1972.

Mississippi State University has secured a developmental grant to set up a demonstration kindergarten project under the Handicapped Children Early Education Assistance Act. This project was awarded June 6, 1970 to Dr. Ernestine Rainey. Mississippi State was one of nineteen project centers selected.

In addition to these events, most of which have encouraged and helped provide direct support to institutional early childhood faculty and staff development, there have been many programs conducted intermittently through college and extension services with early childhood components.

It is thus possible to see, as the various accomplishments of individual institutions are surveyed, emerging patterns of growth relevant to institutional needs, talents, and capacities. Several of the state institutions of higher learning and a few school systems have individually managed to develop a program and a teacher training capability in this urgently needed area. It is especially relevant that although institutional kindergarten education in other parts of the nation has for several years been able to use federal funds, Mississippi institutions are only now beginning to use the funds.

B. Local Public Kindergarten Units

Several local communities, pursuant to existing statuatory authorization in Mississippi,[4] have created public kindergarten units which

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[4] Kindergartens.—The board of trustees of any separate school district in this state may establish and maintain in connection with any of the schools in the separate district, a kindergarten school for children between the ages of four and six years, but the said kindergarten shall be maintained out of funds contributed to the separate school district for such purposes, or by tuitions charged in the said kindergarten department, sufficient to maintain the said school, or schools. No part of said expense to be paid out of the common school funds. The teachers of the kindergarten department shall not be teachers employed in the public school department, but shall be under the supervision of the principal of said school, and employed by the board of trustees of said school.

No person shall be employed as a teacher in any kindergarten hereafter opened under this statute who has not completed a two-year course of kindergarten training in a recognized institution of learning. MISS. CODE ANN. § 6447 (1942).

MISS. CODE ANN. § 6411-16 (1942), states:
Kindergarten and nursery schools—levy of special tax.—The boards of trustees of municipal separate school districts are authorized and empowered, in their discretion, to establish, maintain and operate, in connection with the schools of said district, kindergartens and nursery schools for the care,

provide educational opportunities for kindergarten age children. The statutory authorization will be discussed in a following section, and concern at present will be directed toward a consideration of these existing public kindergarten programs in Mississippi.[5]

The Natchez Special Municipal Separate School District operates a self-supporting kindergarten program with revenue derived from tuition. Four kindergarten units are currently in operation with tuition rates beginning in September, 1970, raised to fifteen dollars per month—an increase of five dollars per month over the previously imposed tuition. Classes are conducted from 8:45 a.m. until 11:45 a.m. with tentative plans for at least one afternoon session from 12:15 p.m. to 2:15 p.m.

Classrooms are housed in the public school facilities; but, due to the lack of revenue, the program is conducted with teachers who are not specifically certified to teach kindergarten age children. The tuitional assessment, along with an additional fee of two dollars, is the only revenue obtained. From this amount the costs of materials and teachers must be defrayed. From correspondence with Natchez school officials, the inadequacy of revenue from tuitional sources is graphically described in relation to teaching personnel:

> Because of the small amount of money, we have not been able to hire qualified teachers. I am sure we would have a better program if we were able to hire qualified teachers.[6]

The effects of the revenue source are further emphasized: "So many

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training, and education of preschool age children. The expense of establishing, maintaining and operating such kindergartens or nursery schools may be paid from funds contributed or otherwise made available to the school district for such purpose, or from funds derived from tuition charged in such kindergartens or nursery schools, or from the proceeds of the supplemental district tax levy, or from the proceeds of the special tax levy herein authorized, but no part of the expense of establishing, maintaining and operating the same shall be paid from the minimum education program fund of such district. In municipal separate school districts situated in any county lying within the Yazoo-Mississippi Delta Levee District, bordering upon the Mississippi River and having a county seat with more than 10,000 population; upon request of the board of trustees of the municipal separate school district the governing authorities of the municipality may levy a special tax of not exceeding two (2) mills in any one year for the purpose of establishing, maintaining and operating such a kindergarten or nursery school, which said tax shall be levied and collected at the same time and in the same manner as other taxes of such school district are levied and collected, and said tax shall be in addition to all other taxes authorized by law. [MISS. CODE ANN. § 6411-16 (1942)].

[5] Three school districts in Mississippi operate public kindergarten programs, Natchez Municipal, Tupelo Municipal, and Meridian Municipal. These programs are those which are considered at this point. The information presented was obtained in correspondence and conversation with representatives of each separate district during the months of July, August, and September of 1970.

[6] Correspondence from the Natchez Special Municipal Separate School District, July 31, 1970.

of the children who need kindergarten the most are from families who cannot afford the tuition. . . . "[7] The Natchez District has operated public kindergarten units at least since 1952. In 1969 there was a total enrollment of one hundred and fifty children.

The public school system in Tupelo has also operated public kindergarten units. At present the system conducts kindergarten education in nine units located in elementary schools, one in a church, and three in privately owned facilities. Sessions are conducted from 8:00 a.m. to 11:00 a.m. and in the afternoon from 12:00 p.m. to 3:00 p.m.

As in the Natchez District, revenue for operation of the program is obtained from the assessment of tuition, fifteen dollars per month, from which are defrayed all costs of materials and teachers. The program in Tupelo has been in operation since, at least, 1944. During the current academic year there are approximately three hundred and twenty-five enrollees. Again, the effects of inadequate revenue are described: "Unfortunately, a number of children who really need the experiences provided by the kindergarten program do not participate due to factors which include finances and transportation. . . ."[8]

The beneficial aspects of the kindergarten program are specifically mentioned in correspondence in the following manner:

> The kindergarten teachers, first grade teachers, and the administrators feel that kindergarten is a vital part of a pre-school program and would like to see it become a . . . part of the school program. First graders who have attended kindergarten are used to routine work, have adapted to large numbers of children in a group under one teacher, have learned to take turns, and have become more independent.[9]

The Meridian Municipal Separate School District also conducts a kindergarten program. Finances for this project are obtained from the United States Government under Title I of the Elementary and Secondary Education Act of 1965[10] for fifteen units and Title III of the same legislation for two units. Under this federally financed program no tuition is charged the two hundred and twenty-five enrollees; however, students are requested to pay for the noon meal if possible. Classes begin at 8:30 a.m. and are terminated at 2:45 p.m., the same length of time for first grade pupils. The program was initiated in 1967, and it has increased in four years from the original two units to seventeen. All teachers have met the requirements for a K-3 certificate issued by the Mississippi State Department of Education in Jackson. The thrust of

[7] *Id.*

[8] Correspondence from the Tupelo Public Schools, July 29, 1970.

[9] *Id.*

[10] Act of April 11, 1965, Pub. L. No. 89-10, 79 Stat. 27.

this program is aimed toward providing early childhood educational advantages for those children of lower income families; thus, many children who also could benefit from kindergarten experiences are excluded.

The programs in existence in these three municipalities offer evidence of the various inadequacies of public kindergarden education in Mississippi. First, the amounts of revenue obtained from tuition are not sufficient to staff kindergarten units with qualified teaching personnel who are trained in early childhood education. Second, the assessment of tuition itself deters many potential enrollees from attendance as the family is unable to pay the costs of tuition. The children are, in many instances, those who would benefit the most from exposure to kindergarten activities. Third, the revenue obtained from the federal government under Titles I and III limits the scope of the kindergarten education to children who are from lower income families, depriving some children of kindergarten education who would greatly benefit from these early childhood educational activities.

III. Legislation on Preschool Education

Prior to discussing the Early Childhood Education Act of 1971, it would be beneficial, perhaps, to review existing statutes in Mississippi which authorize public kindergarten units, and to view provisions for kindergarten units in other states. The purpose of this section is to provide a survey of existing legislative policy in Mississippi and other states which may be employed as a gauge in measuring the Early Childhood Education Act.

A. Existing Kindergarten Legislation in Mississippi

Mississippi entered the field of public kindergarten education in a very limited manner in 1942.[11] This legislation, currently found in Miss. Code Ann. § 6447 (1942), authorizes the board of trustees of any separate school district in the state to establish a kindergarten unit for children of the age of four to six years. The statute also compels all teachers in kindergarten units to possess training in kindergarten education by having completed a two year course of kindergarten training in an accredited institution of higher learning.

The deficiency of this statute, however, is the lack of provision for funds of the state to be used in financing the kindergarten programs. The revenue derived from tuition is not sufficient to cover costs of materials and also adequately compensate teachers. Experience indicates that qualified teachers cannot be obtained to conduct kindergarten units with the revenue derived from tuition as this statute directs.

[11] Miss. Code Ann. § 6447 (1942).

A second legislative pronouncement on public education at the kindergarten level was made in 1953.[12] This enactment extends the privilege of forming public kindergarten units to municipal separate school districts, and further provides that revenue may be obtained from assessment of tuition or by procurement of funds from any revenue source which makes aid available for kindergarten education. The statute authorizes the assessment of a special tax within the district, levied by the local board, to obtain funds for the kindergarten unit; but the statute specifies that no funds under the minimum program for any district may be used for public kindergarten education.

Again, Mississippi legislation has proven deficient as to sources of revenue, since the local districts are restricted to local financing of the units. Possible revenue sources are increased, however, as the statute allows procurement of funds from other available areas. The City of Meridian has been able to operate a growing system of public kindergartens utilizing funds from the United States Government under Title I of the Elementary and Secondary Education Act of 1965.[13] These funds, however, are basically restricted in utility to education for children in lower income families. This source could not provide aid for a comprehensive program of kindergarten education.

Mississippi legislation is inadequate to authorize and implement a program of kindergarten education in the public schools which the children of this state need and to which they are entitled. The present statutes are basically deficient in the area of financing the kindergarten programs in that the sources are extremely limited. The revenue obtained from local sources is totally inadequate to finance the creation and maintenance of public kindergarten units in those areas in which kindergarten education may be the most needed. It should be noted that existing public kindergarten programs are located in municipalities; no early childhood educational advantages are being offered children in the rural areas of Mississippi.

The greatest obstacle to establishment of early childhood education programs in the rural schools is the lack of revenue, which is caused by the limited sources under the existing Mississippi legislation. It is contended that, in order to provide quality kindergarten education in the public schools of Mississippi, the present statutes must be altered or new legislation enacted.

B. Kindergarten Programs in Other States

Having considered statutory provision in Mississippi for kindergarten education in the public schools, a brief cross-sectional view of

[12] Miss. Code Ann. § 6411-16 (1942).

[13] Act of April 11, 1965, Pub. L. No. 89-10, 79 Stat. 27.

other kindergarten programs now operating in the nation will be examined. The presentation may serve as a basis for comparison and perspective with Mississippi now and as the proposed act would change the present shortcomings.

The information in the following paragraphs, and Appendix A, was obtained by consulting the various statutes of each state in an attempt to ascertain the existence and nature of the kindergarten programs in operation. The material is limited to the extent that some statutes are very broadly drawn, and thereby delegate much authority for determining details and minimum standards to the respective state departments of education.

Research into statutory authority indicates that every state, with the exceptions of Georgia and Kentucky, maintains some form of kindergarten program in conjunction with the public school system. The Georgia legislature in the 1971 session will consider a proposal to allow local boards to establish kindergarten units with funding to be provided by the state.[14] Kentucky, however, does possess statutory authority for local boards to create public kindergarten units without state assistance in revenues.[15] Correspondence with the Department of Education of Kentucky indicates that the authorization has not been implemented.[16] Kentucky officials do, however, promulgate minimum standards which privately owned kindergartens must meet in order to receive state approval and accreditation.[17] State authorities enforce compliance with the standards through periodic inspection of each kindergarten. The supervisory procedure seems to be the only major connection with kindergarten education by the Commonwealth of Kentucky.

In considering the characteristics of those programs in operation in the other states, five basic areas will be mentioned: (1) the nature of the program, (2) the procedures which are used to establish the program, (3) the sources of revenue, (4) the general provisions relating to teachers, and (5) the general provisions relating to pupils.

First, as to the nature of the programs, the majority of states operating kindergarten units simply authorize the local governing authorities

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[14] Correspondence from the Department of Education of the State of Georgia, August 14, 1970.

[15] KY. REV. STAT. ANN. § 158.090 (1970).

[16] Correspondence from the Department of Education of the Commonwealth of Kentucky, September 4, 1970.

[17] KY. REV. STAT. ANN. §§ 158.310 - 158.350 (1970).

to establish the units.[18] This method allows the local board to exercise its discretion in determining the need for a kindergarten. These states, therefore, provide "permissive" legislation, as in the Early Childhood Education Act, which simply permits local boards to create kindergarten units as it deems necessary. With the exception of Hawaii, which requires at least fifteen enrollees before a kindergarten unit may be formed,[19] there seems to be no requirement in any state as to the number of children who must be enrolled prior to creation of a unit.

A minority of six states,[20] has legislation which requires local districts to form a kindergarten unit for eligible children within that district. Five of these states neither compel attendance of eligible children, nor require a minimum number of enrollees prior to formation. Florida

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[18] *Alabama*, ALA. CODE tit. 52, § 162 (1958); *Alaska*, ALASKA STAT. § 14.03.080 (d) (1962); *Arizona*, ARIZ. REV. STAT. ANN. § 15-448 (Supp. 1969); *Arkansas*, ARK. STAT. ANN. § 80-1646 (Supp. 1969); *Colorado*, COLO. REV. STAT. ANN. § 123-10-23 (1963); *Connecticut*, CONN. GEN. STAT. ANN. § 10-261 (1964); *Idaho*, IDAHO CODE ANN. § 33-512 (1963); *Indiana*, IND. ANN. STAT. § 28-1443 (1948); *Kansas*, KAN. STAT. ANN. § 72-1201 (1969); *Kentucky*, KY. REV. STAT. ANN. § 158.090 (1970); *Louisiana*, LA. CONST. art. 12, § 1 (1955); LA. REV. STAT. § 17:154 (1963); *Maine*, ME. REV. STAT. ANN. tit. 20, § 859 (Supp. 1970); *Maryland*, MD. ANN. CODE art. 77, §§ 1, 28 (1957); *Massachusetts*, MASS. GEN. LAWS ANN. ch. 71, § 1, ch. 70, § 2, ch. 72, §§ 2, 2A (Supp. 1969); *Michigan*, MICH. STAT. ANN. § 21.171-73; *Minnesota*, MINN. STAT. ANN. § 123.35 (Supp. 1970); *Mississippi*, MISS. CODE ANN. §§ 6447, 6411-16 (1942); *Missouri*, MO. ANN. STAT. § 171.091 (1965); *Montana*, MONT. REV. CODE ANN. § 75-2005 (1962); *Nebraska*, NEB. REV. STAT. § 79-443-44; State ex rel Shineman v. Board of Education, 152 Neb. 644, 42 N.W.2d 168 (1950); *Nevada*, NEV. REV. STAT. § 388.060 (1967); *New Hampshire*, N.H. REV. STAT. ANN. § 189:25 (1964); *New Jersey*, N.J. STAT. ANN. § 18A:44-2 (1968); *New Mexico*, N.M. STAT. ANN. § 77-11-2 (1953); *New York*, N.Y. EDUC. LAW §§ 1712, 2514, 2554, 2555 (McKinney 1953); *North Carolina*, N.C. GEN. STAT. § 115-38 (1966); *North Dakota*, N.D. CENT. CODE § 15-45-01 (1960); *Ohio*, OHIO REV. CODE ANN. § 3313.53 (1960); *Oklahoma*, OKLA. STAT. ANN. tit. 70, §§ 1-7, 4-36 (1966); *Oregon*, ORE. REV. STAT. § 332.075 (1969); *Pennsylvania*, PA. STAT. tit. 24, § 5-502 (1962); *South Carolina*, S.C. CODE ANN. § 21-601 (1962); *South Dakota*, S.D. COMP. LAWS § 13-33-3 (1967); *Tennessee*, TENN. CODE ANN. § 49-2301 (1956); *Utah*, UTAH CODE ANN. § 53-7-16 (1970); *Vermont*, VT. STAT. ANN. tit. 16, § 563 (Supp. 1970); *Virginia*, VA. CODE ANN. §§ 22-21, 22-218 (1950); *Washington*, WASH. REV. CODE § 28.35.010 (1969); *West Virginia*, W. VA. CODE ANN. § 18-5-18 (1966); *Wisconsin*, WIS. STAT. ANN. § 120.13 (14) (Special Pamphlet, Public Instruction, 1970); *Wyoming*, WYO. STAT. ANN. § 121.1-27 (i) (Supp. 1969).

In Delaware and Hawaii the state boards of education have discretionary power to establish kindergarten units. DEL. CODE ANN. tit. 14, § 204 (Supp. 1969); HAWAII REV. LAWS § 298-4 (1968).

[19] HAWAII REV. LAWS § 298-4 (1968).

[20] CAL. EDUC. CODE § 5251 (West 1969); FLA. STAT. ANN. § 228.13 (1) (Supp. 1970); ILL. ANN. STAT. ch. 122, § 10-120.19a (Supp. 1970); IOWA CODE § 275.25 (13) (Supp. 1970); R.I. GEN. LAWS ANN. § 16-2-2 (1969); ch. 447, Acts of the 59th Legislature, Regular Session as amended by House Bill No. 240 of the 1970 Regular Session of the Texas Legislature.

requires the enrollment of at least twenty children.[21] These programs are "mandatory" in nature. Any exercise of discretion is removed from the local boards.

Second, as to procedures used in establishing kindergarten units, three basic methods are employed. Authorization for the program in all three instances must be provided by the state legislature. The moving factor behind formation in the first method remains with the legislature, in "mandatory" legislation, and with the local board in instances of "permissive" legislation, while in the second and third procedures the residents of the school district must initiate the program.

The first method has been referred to previously; that is, legislation which authorizes the local governing bodies to create a kindergarten unit and, then, either allows or requires the local board to act. The initiative and/or responsibility is placed with the local officials. This procedure is used by all states except Nevada, North Dakota, Oregon, and Vermont.

A second method is used in Nevada, where a kindergarten may be established in response to the desires of the residents of the district. The local governing authorities in Nevada are empowered to form a kindergarten unit upon receipt of a petition signed by parents or guardians of at least twenty-five percent of the eligible children.[22] Authorization for an identical procedure exists in Iowa,[23] effective in 1959. Subsequent legislation seems to require formation of a kindergarten unit by a school prior to receiving an accredited status by the Iowa State Department of Education.[24] The latter statute became effective in 1966 and, even though not expressly repealing the former statute, is considered to replace the former procedure.[25]

A third method is employed in North Dakota, Oregon, and Vermont. North Dakota statutes, pursuant to a petition signed and properly filed by at least twenty percent of the residents of the school district, require submission of the question of public kindergarten units to the voters of the district at the next regularly scheduled election.[26] A majority vote requires the creation of a kindergarten unit.

Oregon statutes authorize a school district with at least twenty thousand children to operate a kindergarten pursuant to a majority vote

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[21] FLA. STAT. ANN. § 228.13 (1) (Supp. 1970).

[22] NEV. REV. STAT. § 388.060 (1967).

[23] IOWA CODE § 280.16 (1966).

[24] IOWA CODE § 275.25 (1) (Supp. 1970).

[25] Interview with Dr. Joseph W. Cassidy, Associate Professor of Education, University of Mississippi, and member of the Iowa State Senate, 1965-1969.

[26] N.D. CENT. CODE § 15-45-01 (1960).

being obtained on the question in a regularly scheduled election.[27] The question must be submitted to the voters of the district upon proper filing of a petition signed by at least one-third of the voters of the district.[28]

Vermont's procedure is electoral also, but is not based upon filing of a petition. At any town meeting, the question of public kindergarten units may be presented by the local school board.[29] An affirmative majority vote obtained thereafter requires creation of the unit.[30]

A few states, in the authorizing legislation, provide for the termination of the kindergarten unit if the average daily attendance for any one year falls below a set figure. Nevada and Wisconsin statutes allow a local board to discontinue the unit if the attendance for the previous year falls below fifteen pupils.[31] Pennsylvania law requires termination if attendance for the year before was under ten pupils.[32] North Dakota statutes provide that upon a petition signed and properly filed by at least twenty percent of the voters of that district, the question of termination must be submitted at the next regularly scheduled election.[33] The local boards in North Dakota are given authority to submit the question of termination without a petition after the unit has been in operation for a period of two years.[34] Connecticut law, in corollary, prohibits termination of the unit if it has been in continuous operation for five years without reference to any specific number of pupils in attendance.[35]

Third, as to revenue source, only twelve states which authorize public kindergarten units require the local district to bear all costs of creation and operation.[36] The other thirty-six provide for state assistance to the kindergarten units. In addition to those funds provided under the various minimum programs, which are usually directed to-

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[27] ORE. REV. STAT. § 332-075 (1969).

[28] *Id.*

[29] VT. STAT. ANN. tit. 16, § 563 (18) (Supp. 1970).

[30] *Id.*

[31] NEV. REV. STAT. § 388.060 (1967); WIS. STAT. ANN. § 120.13 (14) (Special Pamphlet, Public Instruction, 1970).

[32] PA. STAT. tit. 24, § 5-503 (1962).

[33] N.D. CENT. CODE § 15-45-04 (1960).

[34] *Id.*

[35] CONN. GEN. STAT. ANN. § 10-15a (Supp. 1965).

[36] *Alabama*, ALA. CODE tit. 52, § 162 (1958); *Arizona*, ARIZ. REV. STAT. ANN. §§ 15-448, 15-1212 (Supp. 1969); *Idaho*, IDAHO CODE ANN. § 33-512 (1963); *Kentucky*, KY. REV. STAT. ANN. § 158.090 (1970); *Mississippi*, MISS. CODE ANN. § 6447 (1942); § 6411-16 (1942); *Montana*, MONT. REV. CODES ANN. § 75-2005 (1962); *Nevada*, NEV. REV. STAT. § 388.060 (1967); *New Mexico*, N.M. STAT. ANN. § 77-11-2 (1953); *North Dakota*, N.D. CENT. CODE § 15-45-01 (1960); *Oregon*, ORE. REV. STAT. § 336.115 (1969); *South Carolina*, S.C. CODE ANN. §§ 21-601-02 (1962); *West Virginia*, W. VA. CODE ANN. §§ 18-5-18, 18-9A-2 (1966).

ward defraying costs of materials, supplies, activities, and salaries, provision for aid usually includes costs of construction of physical facilities and transportation for pupils.

From correspondence with three state departments of education,[37] information was received that legislation will be presented to the respective state houses of these states in the 1971 session in an attempt to procure state funding for local kindergarten units. Success in passage of the legislation in these states—Georgia, Montana, and North Dakota—along with adoption of the Early Childhood Education Act in Mississippi, would add four states to those who provide for state financing of kindergarten units in the public schools.

Fourth, as to teachers of kindergarten units, statutes speak to two main concerns: certification and status.

Completion of a course of training in an institution of higher learning directed toward kindergarten age children is a prerequisite to certification in the majority of states which refer to certification standards in statutes. The Florida statute, for example, requires teachers to earn certificates, specifically in early childhood education,[38] as do those of New Jersey[39] and South Carolina.[40] The state department of education in Utah administers a special examination for potential kindergarten teachers to ascertain their qualifications.[41]

Teachers of kindergarten units in states providing state aid to the units are apparently considered employees of the state. All remuneration and benefits accorded teachers of other grades are extended those in early childhood education.

Fifth, in regard to provisions relating to pupils, three areas are usually mentioned: age, health requirements, and length of time in school.

The age of eligibility for kindergarten enrollees which is most often found, in fifteen states,[42] is five years. Nine other states authorize

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[37] The Department of Education of the State of Georgia, August 14, 1970; The Office of the State Superintendent of Education of the State of Montana, August 3, 1970; The Department of Public Instruction of the State of North Dakota, August 3, 1970.

[38] FLA. STAT. ANN. § 236.04(3) (Supp. 1969).

[39] N.J. STAT. ANN. § 18A:443-3 (1968).

[40] S.C. CODE ANN. § 21-603 (1962).

[41] UTAH CODE ANN. § 53-7-16 (Supp. 1970).

[42] *Alaska*, ALASKA STAT. § 14.03.080(d) (1962); *Arkansas*, ARK. STAT. ANN. § 80-1646 (Supp. 1969); *California*, CAL. EDUC. CODE § 5254 (West 1969); *Florida*, FLA. STAT. ANN. § 232.04 (Supp. 1969); *Hawaii*, HAWAII REV. LAWS § 298-4 (1968); *Kansas*, KAN. STAT. ANN. § 72-1107 (1969); *Maine*, ME. REV. STAT. ANN. tit. 20, § 859 (Supp.

children from four to six years to attend.[43] Montana and Colorado statutes extend enrollment to three-year-old children, whereas Indiana, Oklahoma, and Tennessee law provides a maximum age of six years.[44] The children of South Carolina may enroll at age four,[54] while those in Vermont must wait until their sixth birthday.[46]

Certain regards for the child's health are often considered requirements. These usually include chest x-rays, immunizations, and dental examinations. The requirements relative to health are basically those which are prerequisites for admission into the first grade of that district.

Statutes which speak to the length of time in which the child is in school vary to a great extent. A median of three to three and one-half hours was ascertained. This length is evidently considered sufficiently brief to retain the child's interest in the activities, yet sufficient in length to be of educational value to the child. As a consequence of this shorter day, kindergarten pupils for purposes of computing "teacher units" under the various minimum programs of education are considered as one-half pupil. In a state such as Delaware where a teacher unit for other grades is one teacher for each twenty-five pupils, a unit for kindergarten aid is one teacher for fifty pupils.[47]

This theory is, perhaps, of questionable value in that preparation for a class of twenty-five kindergarten pupils would seem to require more time than for other age children. Teachers should be allowed to spend that portion of the day in which they are not in the teaching situation in preparing programs and activities for the pupils which are designed to retain attention and interest and be of sound educational value.

1970); *Michigan*, MICH. STAT. ANN. § 15.3357 (1967); *Missouri*, MO. ANN. STAT. § 171.091 (1965); *Nebraska*, NEB. REV. STAT. § 79-444 (1966); *New Mexico*, N.M. STAT. ANN. § 77-11-2 (1953); *North Carolina*, N.C. GEN. STAT. § 115-162 (Supp. 1969); *Rhode Island*, R.I. GEN. LAWS ANN. § 16-2-27 (1956); *Virginia*, VA. CODE ANN. § 22-218 (Supp. 1969); *Wyoming*, WYO. STAT. ANN. § 21.1-58 (b) (Supp. 1969).

[43] *Louisiana*, LA. CONST. art. 12, § 1 (1955); *Minnesota*, MINN. STAT. ANN. § 123.35 (Supp. 1970); *Mississippi*, MISS. CODE ANN. § 6447 (1942); *New Jersey*, N.J. STAT. ANN. § 18A:44-2 (1968); *New York*, N.Y. EDUC. LAW §§ 1712, 2514, 2554, 2555 (McKinney 1953); *Oregon*, ORE. REV. STAT. § 336.105 (1969); *Pennsylvania*, PA. STAT. tit. 24, § 5-503 (1962); *Washington*, WASH. REV. CODE § 28.35.010 (1969); *West Virginia*, W. VA. CODE ANN. § 18-5-18 (1966).

[44] *Colorado*, COLO. REV. STAT. ANN. § 123-10-23 (1963); *Indiana*, IND. ANN. STAT. § 28-1443 (1948); *Montana*, MONT. REV. CODE ANN. § 75-2005 (1962); *Oklahoma*, OKLA. STAT. ANN. tit. 70, § 1-16 (Supp. 1970); *Tennessee*, TENN. CODE ANN. § 49-2301 (1956).

[45] S.C. CODE ANN. § 21-601 (1962).

[46] VT. STAT. ANN. tit. 16, § 11 (Supp. 1970).

[47] DEL. CODE ANN. tit. 14, § 1703 (Supp. 1968).

IV. The Early Childhood Education Act of 1971.

The Early Childhood Education Act of 1971 is quite similar to statutes in other states which authorize public kindergarten education. It offers, however, a distinct advantage over other statutes in that it is more comprehensive and specific. While most aspects of public kindergarten training are provided for in broad terms, thereby offering expression of legislative policy in regard to the kindergarten program *per se*, matters of expertise and detail are to be provided by professional educators in the Mississippi State Department of Education through promulgation of minimum, standard regulations.

The basic philosophy behind the Act, as it relates to the existing public school system, seems simply to be the addition of a thirteenth grade to the elementary and secondary grades. The kindergarten units, as are other grades, of necessity, must be entities unto themselves. In view of the age of the child and the special requirements of young children who are being exposed to an institutionalized educational environment for the first time, this is essential. However, the rules and regulations under statute and administrative promulgation would be extended to kindergarten units in assimilating the units into the free public school system of the state, and thereby govern this new level of education in the same manner as all other levels.

Simply stated, the Early Childhood Education Act offers local school districts the opportunity to add another level of education to those levels currently in operation. Operation of the new level will be subject to the same restrictions, opportunities, and benefits as are other levels of the free public school system.

Perhaps the most advantageous approach to a discussion of the Early Childhood Education Act is a section-by-section description of the Act along with commentary on the various provisions.

Sections one and two state the title of the combined sections and express the intent of the legislature in adopting these provisions. The basic purpose of the program is to allow five-year-old children to enter the public schools, thereby beginning their educational experience at an earlier age and enhancing their later educational development. The intent of the legislature to permit, rather than require, local boards to establish kindergarten units is also expressed in section two, wherein local boards are *encouraged* to employ available state funds to establish kindergarten units. Finally, the legislation includes language which allows a wide interpretation of the provisions of the Act in order to insure the implementation of policies or programs which would accomplish the stated purpose of providing early childhood education for five-year-old children.

Section three offers clarification through definition of the terms "kindergarten unit," "local board," and "state aid." The first two definitions will be considered at present while the third is covered in the discussion of section ten of the Act.

"Kindergarten unit" simply denotes a downward extension of the public school system to include those children who, at present, are not considered of educable age in Mississippi. A kindergarten unit is considered to be a class of five-year-old children following a program appropriate for very young children. One distinction is in that the definition restricts enrollment in a particular unit to those children residing within the district, and it makes no provision for children residing without the district. In following the philosophy of the Act, the assumption is offered that children residing without the district are eligible to attend the kindergarten unit, but must tender tuition payment in the same manner as children who reside without the district and attend other grades in schools within the district.

"Local school board" denotes the particular governing authority of any municipal, county, consolidated, separate, county-unit, special, or line, or any other species of school district at present in existence in Mississippi. The only restriction imposed upon a school board which desires to form a kindergarten unit is that the board must have in operation at that time at least one elementary school.

Section four authorizes every school board in a district which maintains at least one elementary school to create a kindergarten unit as part of the free public school system of this state, and limits accessibility to such unit to those children residing within the district. Under this section, a local board is empowered to establish as many separate kindergarten units or classes as it deems necessary to meet the needs of its five-year-old children. However, each unit must be limited in size according to the regulations of the State Department of Education in relation to the number of pupils per teacher which is allowed. It is also noted that the effect of this section is to allow local school boards to establish kindergarten units. This Act is, in effect, an example of "permissive" legislation.

Section five sets the final birth date for eligibility as an enrollee in the unit. This deadline, January 1 of the academic year for which enrollment is desired, is the same as that date for enrollment in the first grade. The age, five years, is one year below that age presently required to be of educable age in Mississippi.

Section six sets forth requirements and privileges of teachers in the kindergarten units. This provision expressly includes teachers of such units among employees of the state public school system, as are teachers

of other grades. It is done, ostensibly, to offset any contrary opinion which might be derived from a reading of Miss. Code Ann. § 6447 (1952), even though Section 6447 is repealed in the Act. This latter section of the code did not include teachers in any kindergarten unit established by local boards among employees of the state public schools. They were held specifically to be employees only of the local district. Under the Act, teachers of kindergarten pupils are to be accorded all privileges as to remuneration and increases, either across-the-board or by further educational study and teaching experience; all retirement benefits and privileges therein; all benefits accruing from the various teacher credit unions; and all group insurance benefits.

However, under this section, teachers of kindergarten units are required to complete a course of training in a prescribed educational program developed by the appropriate specialists in accredited institutions of higher learning in conjunction with the appropriate officials of the State Department of Education. At present, educational programs consist of those courses offered at institutions of higher learning in Mississippi which qualify a teacher to receive certification to teach kindergarten through the third grade—a K-3 certificate. Mississippi colleges and universities presently offer a minimal three-semester-hour course in early childhood education which must be completed by teachers under the K-3 certification requirements to become effective in September of 1972. This three-hour course is the only specialized training presently offered in Mississippi directed toward education of kindergarten teachers.

Section seven delegates authority to the State Department of Education to determine specific requirements which the kindergarten units must meet in regard to facilities, equipment, supplies, and materials in order to receive certification and approval by the department. In addition, the department is given authority to formulate, in conjunction with the appropriate specialists in the institutions of higher learning, various curriculums and approaches to kindergarten training which the units may pursue.

Early childhood education in public schools often uses various approaches and teaching methods according to the particular needs of the district. For example, some districts employ only classroom instruction, while others, in which conventional classroom instruction may not be feasible due to transportation difficulties, teach in conveniently located homes where the teacher works with small groups of children. In addition, some districts employ the services of mothers of the small children for the actual teaching tasks while the certified teacher supervises mothers in several different home-teaching situations. This section will allow the state department to organize these various approaches in conjunction with the colleges and universities, and in cooperation with

the local board, establish the program best suited to the needs of the district.

Finally, the state department is responsible for promulgating regulations which concern physical facilities including floor space, rest areas, sanitation facilities, recreational areas, and provision for meals or snacks.

Section eight requires that kindergarten pupils be in school no longer than those children who are enrolled in the first grade. It is noted that the provision of time in this section is twice that time provided in most states. This additional time is necessary to enable local school districts to adequately meet the difficulties incurred in the transportation of children to and from school. Should the legislation provide for a shorter day for kindergarten pupils, many districts would have to operate an extra schedule of buses for the kindergarten pupils. The expense incurred would possibly deter those districts from providing kindergarten education even though state assistance is available. Experience in this state indicates that the length of time provided for in this section does not cause the child to lose interest in or attraction for, the kindergarten program. Further, the additional time is of benefit to the teacher and pupils alike.[48]

Section nine prohibits any kindergarten unit formed in a public school after the passage of the Act from charging tuition to any resident pupil. This section, however, does allow those school districts which presently maintain public kindergarten programs by assessing tuition to continue the practice. Hopefully, these districts will cease to charge tuition upon passage of the Act and take advantage of the state aid available to them.

Section ten provides for aid from the State of Mississippi to those districts which choose to institute kindergarten units under the authority of the Act. Aid is specifically included under the Minimum Program of Education of Mississippi, for construction of physical facilities, and for transportation expenses. These three areas of state aid cover the basic costs of the local districts; but, this section, by specifically including these three areas, should not be construed as preventing state aid under any other program in existence or enacted at some future date. The specific inclusion of these does not exclude other programs of aid.

Section eleven provides that under the Minimum Program of Education, a "teacher unit" for purposes of state aid is to be considered as one teacher for each twenty pupils. The standard for computation of

[48] Interview with Miss Mary Ruth Stribling, Meridian Municipal Separate School District, November 20, 1970.

aid to units of other grades is one teacher for each twenty-seven pupils. The number for kindergarten units is less since the younger children need more supervision and individual assistance than do older children. The kindergarten pupil is designated as one pupil, rather than one-half, for aid under the Minimum Program since the child may be in school for the entire day, as opposed to one-half day.

Section twelve simply provides that assistance from the United States Government, corporations, individuals, or philanthropic organizations who wish to donote money or personal property, transfer land, or render any type of financial assistance will not be prohibited from so doing under this section. Specifically, Title I funds remain available to school districts under the provisions of the Act.

Section thirteen provides that this Act shall be in force from June 1, 1971, should it be approved by the Legislature, and that the other sections of the Mississippi Code—sections 6447 and 6411-16—which relate to public kindergarten education are expressly repealed by this Act. This repealing clause insures that only the provisions of the Early Childhood Education Act are those which concern creation and maintenance of kindergarten units.

Having viewed the provisions of the Act, a limited comparison of this legislation and the existing legislation is offered to point out several particular instances of difference.

The greatest difference is found in provisions for revenue. The Act authorizes financial assistance from the State of Mississippi under the Minimum Program and in areas of construction and transportation. By including the Minimum Program, adequate revenue is obtained to engage certified teaching personnel which, under existing law, is almost impossible. The Act eliminates assessment of tuition and special tax levies while retaining benefits of financial aid received from private sources along with that from the federal government.

The status of teachers under the Act is also altered in that teachers are employees of the public schools rather than employees of the local district under existing legislation. This alteration is necessary to attract more and better qualified teaching personnel for the kindergarten units. The thrust of the alteration is to increase salaries and extend all benefits of credit unions, retirement, and insurance to kindergarten teachers.

The age of the pupil eligible for enrollment is raised to five years. This limitation, perhaps, may prove beneficial in that smaller numbers of children are eligible for enrollment. The initial creation and operation of the kindergarten units may be conducted in a more efficient and effective manner. Should kindergarten units prove worthy of continuation with the five-year-old children, amendment to the Act could pro-

vide for inclusion of four and possibly three-year-old children within the purview of public preschool education in future years.

The scope of authorization of the kindergarten program is extended. Under the Act, all school districts are eligible to create kindergarten units if at least one elementary school is operated, whereas existing law limits creation to a certain class of school districts. This extension, as a matter of course, includes more children than existing statutes potentially encompass, and thereby makes public kindergarten training available to all five-year-old children within the state.

Comparison of existing and proposed legislation reveals that the proposed Early Childhood Education Act is more extensive in potential application, offers increased and more stable financial support, and allows for a more professional approach to the education of kindergarten age children in Mississippi.

V. Conclusion

School systems in Mississippi have had the authority to establish locally funded kindergarten units for nearly thirty years. Currently only three school districts provide kindergarten education. The education offered in these three districts is limited due to the need to assess a tuition which serves to eliminate many children while yet providing insufficient revenue to acquire the services of qualified teaching personnel.

Kindergarten education in the institutions of higher learning in Mississippi has centered around pilot programs within the sphere of individual institutions. Though this development indicates some progress for institutional Mississippi in the past decade, seventeen states have expanded their kindergarten program by providing for state funding of their kindergartens during the same period of time.

The present interest and activity in early childhood education in Mississippi cannot be transmitted effectively to the public school system without reformation of the present statutes which authorize kindergarten units. Adoption of the Early Childhood Education Act of 1971 by the Mississippi Legislature would provide authorization for kindergarten education in Mississippi on a level that would be both practical and economical. It could be phased into operation so as to allow all of the school systems of the state to develop a staff and program that would best suit their community needs. It would be initiated at a time when existing school facilities could be utilized throughout most of the state. Above all, it would provide an opportunity to bring an important phase of the federal early childhood education effort into the control of the state's institutional system—a movement that alone should provide both educational and economic savings for all levels of government.

APPENDIX A

State	Relevant Statutory Authorization	Date Enacted	Optional	Mandatory
Alabama	Ala. Code Tit. 52, § 162 (1958).	1927	X	
	Municipalities may establish kindergarten programs with no state support, but county districts have no authority to establish kindergarten programs.			
Alaska	Alaska Stat. § 14.03.080 (d) (1966).	1966	X	
	Local districts are authorized to establish kindergarten programs as part of the free public school system with funding from state sources. Children must be five years of age on or before November 2, of the academic year for which enrollment is desired in order to be eligible.			
Arizona	Ariz. Const. art. 11, § 1.	1912	X	
	Ariz. Rev. Stat. Ann. §§ 15-448, 15-1212 (Supp. 1969).	1957	X	
	The constitutional provision allows the legislature to provide for kindergarten programs as part of the free public school system, and the cited statute authorizes local boards to establish and maintain kindergartens as part of the public school system.			
Arkansas	Ark. Stat. Ann. §§ 80-1644 to -1654 (Supp. 1969).	1969	X	
	Local districts may establish Early Childhood Education Centers for children who are five years of age on or before 1 October of the academic year, but funding at present from the state has been limited to five pilot projects located in municipalities wherein are institutions of higher learning.			
California	Cal. Educ. Code §§ 5251-5255, 11001-11003 (West 1969).	1967		X
	Local districts which maintain an elementary school are required to also maintain kindergarten programs for children of age four years, nine months on or before 1 September of the academic year, or if the school operates two terms, a child may enter the second term if he is of specified age by 1 February. Funding for the			

State	Relevant Statutory Authorization	Date Enacted	Optional	Mandatory
	kindergarten program is from state sources, and the kindergarten program may be combined with the first grade provided the total enrollment of the class does not exceed twenty-eight per teacher. No child may re-receive more than one day attendance credit for each day spent in school nor may any child be kept in school for more than four hours nor less than two and one-half hours per day inclusive of recess.			
Colorado	Colo. Rev. Stat. Ann. § 123-30-20 (Supp. 1965).	1964		X
	Local districts, with state support, may establish kindergartens with funding to come from local special school funds. Eligible children must be one year younger than that age required for admission into the first grade.			
Connecticut	Conn. Gen. Stat. Ann. §§ 10-15, 10-16, 10-261 (1962); §§ 10-15A, 10-273 (Supp. 1965).	1918		X
	The kindergarten program in Connecticut is considered part of the free public school system with state financial support, including transportation costs. The school day for pupils in kindergarten is two and one-half hours, and no kindergarten program shall be discontinued after having been in operation for five years.			
Delaware	Del. Code Ann. tit. 14, §§ 204, 1703 (Supp. 1969).	1968		X
	The Board of Education of Delaware has the power to establish kindergarten programs in school districts which so desire them. State funding for kindergarten programs began in 1968 and all districts in Delaware will have kindergarten programs in operation by 1971. For purposes of state aid, a "teacher unit" is fifty pupils divided into two instructional groups of twenty-five children each who attend sessions for one-half day.			
Florida	Fla. Stat. Ann. §§ 228.041, 221.13 (1), 232.04, 236.04 (3) (Supp. 1969).	1967		X
	Local districts must provide thirteen years of public instruction which includes the kindergarten grade as part of the public school system. Local boards must establish kindergarten grades if there are twenty children			

State	Relevant Statutory Authorization	Date Enacted	Optional	Mandatory
	residing within the district who are five years of age on or before 1 January of the academic year. A kindergarten pupil shall be in school at least three hours per day exclusive of recess, and instructional units for purposes of state aid shall be computed as one unit for each twenty-five children. All teachers must hold certificates in early childhood education and all physical facilities, educational materials and equipment, and specifications must be approved by the state board of education prior to qualifying the local district kindergarten for state aid.			
Georgia	No provisions located.			
Hawaii	Hawaii Rev. Laws §§ 298-2, 298-4 (1968).	1943	X	
	The State Department of Education for Hawaii may establish kindergartens funded by the state in local districts in which fifteen children reside who are five years of age on or before 31 December of the academic year.			
Idaho	Idaho Code Ann. § 33-512 (1963).	1963	X	
	Local districts are authorized to establish kindergarten programs, but there is no provision for state aid, and all financial support must come from the district.			
Illinois	Ill. Ann. Stat. Ch. 122 § 10-20.19a (Smith-Hurd Supp. 1970).	1969		X
	School boards are given the duty of establishing and maintaining kindergarten programs under regulations promulgated by the Superintendent of Public Instruction with funding provided by the state.			
Indiana	Ind. Ann. Stat. §§ 28-1443, 28-6409 (1948); § 28-1036 (Supp. 1970).	1943	X	
	Local districts may establish kindergarten programs for children under the age of six years with financial aid from the state. Kindergarten pupils for purposes of computing state aid under the minimum program for Indiana are to be counted as one-half pupil.			
Iowa	Iowa Code §§ 280-16, 257-25 (13) (Supp. 1970); § 285.1 (1966).	1959		X

State	Relevant Statutory Authorization	Date Enacted	Optional	Mandatory
	A procedure exists under the 1959 Statute whereby local school boards, on petition of the parents or guardians of twenty-five or more children of eligible age, and residing within the district, are authorized to establish a kindergarten and maintain it with funding from state sources. However, a reading of the 1966 Statute seems to indicate a legislative intent that, prior to becoming accredited with the Iowa Department of Education, a school must offer a kindergarten education. The 1966 Statute is considered to be a legislative mandate which requires all public school systems in Iowa to offer kindergarten units as a prerequisite to becoming accredited by the Iowa Department of Education.			
Kansas	Kan. Stat. Ann. § 72-1201 (1964); §§ 72-1107, 72-7002 (Supp. 1965).	1964		X
	Local districts may establish kindergarten programs with state support for children five years of age on or before 1 September of the academic year. For purposes of state aid, kindergarten pupils are considered one-half pupil as determined for other grades.			
Kentucky	Ky. Rev. Stat. Ann. § 158.090 (1970).	1970		X
	Local districts may establish kindergarten programs without financial aid from the state, however, correspondence with the Department of Education in Kentucky indicates that this statutory authorization has not been used in any instance.			
Louisiana	La. Const., art. 12 § 1.	1955		X
	La. Rev. Stat. § 17:154 (1963).	1922		X
	The constitutional provision allows the legislature to authorize kindergarten programs for children of ages four to six with funds available in the same manner as for other grades, and the cited statutes set the length of the school day for kindergarten pupils.			
Maine	Me. Rev. Stat. Ann. tit. 20, § 859 (Supp. 1969).	1943		X
	Local boards may establish kindergarten programs for children five years of age on or before 15 October of the academic year with funding provided by the state.			

State	Relevant Statutory Authorization	Date Enacted	Optional	Mandatory
Maryland	Md. Ann. Code art. 77, § 73 (4) (Supp. 1970).	1969		X

Local boards are required to furnish free public education with provision for state aid to kindergarten units. Kindergarten units by recent legislation will be established in every school district by the school year beginning in September, 1973.

Massachusetts	Mass. Gen. Laws Ann. ch. 70, §§ 2, 4; ch. 72, §§ 1, 2, 2A (Supp. 1969).			

Local boards are required to provide free public education and provision is present for state aid to kindergarten programs and for recordation of all students enrolled in the public school kindergarten program.

Michigan	Mich. Stat. Ann. §§ 15.3584, 15.3357 (1968); § 15.1919 (62) (Supp. 1970).	1948		X

Local boards may establish kindergarten programs as part of the public school system for children five years of age by 1 December of the academic year. Funding for the program is provided by the state, but the local school districts are responsible for development and implementation of the curriculum.

Minnesota	Minn. Stat. Ann. § 124.62 (1960); §§ 123.35, 124.17 (1), 126.12, 501.11 (Supp. 1970).	1959		X

Local boards may presently establish kindergarten for children ages four to six, but beginning 1 September, 1971, all children must be five years of age on or before 1 September of the academic year. Funding is from state sources, and the kindergarten, by statute, may accept federal aid or any contribution given it in the form of an express trust. Kindergartens are exempt from the requirement that pupils must attend class for nine months of the year, and for purposes of state aid, a kindergarten pupil is counted as one-half a pupil enrolled in another grade.

State	Relevant Statutory Authorization	Date Enacted	Optional	Mandatory
Mississippi	Miss. Code Ann. § 6647 (1942); § 6411.16 (Supp. 1968).	1942 1953		X

Local boards of separate school districts may establish kindergarten programs for children of ages four to six, which shall be financed by the local district or by tuition charged the pupil as no state funds are available. Teachers are not considered employees of the public school system, but rather of the local board. Certain local school districts may levy a special tax for the financing of the kindergarten program.

Missouri	Mo. Ann. Stat. § 171.091 (1965); §§ 163.011, 163.013, 163.017 (Supp. 1970).	1963		X

Local boards may establish kindergarten programs for five year old children, with funding provided by the state, including transportation costs. For purposes of determining state aid, the "average daily attendance" for kindergarten pupils is determined by dividing one-half the total number of days attended by kindergarten pupils whose fifth birthday occurs before 1 October after the first day of the school term by the actual number of days that the school was in session, excluding legal holidays and teachers' meetings.

Montana	Mont. Rev. Code Ann. § 75-2005 (1962).	1921		X

Local boards may establish kindergarten programs for children ages three to six, but the local district must bear all expenses incurred with no funding from the state.

Nebraska	Neb. Rev. Stat. §§ 79-443, 79-444 (1943).	1881		X

These sections as interpreted by the Nebraska Supreme Court in *State ex. rel. Shineman v. Board of Education*, 152 Neb. 644, 42 N.W.2d 168 (1950) allow local boards to establish kindergarten programs with state aid for children five years of age on 15 October of the academic year.

Nevada	Nev. Rev. Stat. § 388.060 (Supp. 1967).	1959		X

Local boards may establish kindergarten programs upon petition of the parents or guardians of at least

State	Relevant Statutory Authorization	Date Enacted	Optional	Mandatory
	twenty-five children residing within the district who are eligible for attendance. The local district must bear all costs of operation, and if average daily attendance for any one year period falls below fifteen, the local board may discontinue the kindergarten program.			
New Hampshire	N. H. Rev. Stat. Ann. §§ 194:19-a, 194:23-d, 198:10-a (Supp. 1970).	1967		X
	The State Board of Education, in its discretion, may establish a kindergarten grade in the elementary school with funding from the state.			
New Jersey	N. J. Stat. Ann. §§ 18A: 44-2, 44-3, 44-4 (1967).	1903		X
	The local board may establish a kindergarten program for children over the age of four, but under the age of six as part of the elementary school program with all expenses paid as are expenses for other grades of the public school. Teachers must hold an appropriate certificate qualifying them to teach in kindergarten programs issued in the same manner as certificates for other teachers in the public schools.			
New Mexico	N. M. Stat. Ann. § 77-11-2 (1953).	1953		X
	The local board may establish a kindergarten program for children who are eligible. Children must be five years of age before 1 January of the academic year for which enrollment is sought. The state board may adopt rules and regulations for minimum standards to be applied in all kindergarten programs, but the local district must bear all costs of establishing and maintaining the program.			
New York	N. Y. Educ. Law §§ 1712, 2514, 2554, 2555, 3621 (McKinney 1953).	1910		X
	Local boards may establish kindergarten programs in the local schools for children ages four to six years with state support, including transportation costs.			
North Carolina	N. C. Gen. Stat. §§ 115-38, 115-162 (1966); § 115-198.1 (Supp. 1969).	1955		X

State	Relevant Statutory Authorization	Date Enacted	Optional	Mandatory
	Local boards may establish kindergarten programs in cities and counties for children of age five years before 15 October of the academic year. The programs are considered part of the public school system, and are subject to the regulations of the State Board of Education. The State Board is further charged with the responsibility of establishing as many kindergarten programs as possible in North Carolina's eight educational districts. The State Department of Education in North Carolina is given the authority to establish as many kindergarten units as possible in each educational district of that state.			
North Dakota	N.D. Cent. Code §§ 15-45-01, 15-45-02, 15-45-03, 15-45-04 (1960).	1909		X
	Local boards, at any annual election, may submit to the resident voters of the district the question of establishing a kindergarten program as part of the public school. And, upon petition of at least twenty percent of the qualified electors of the school district, the question of establishing the kindergarten program must be submitted. Upon a majority vote in either situation, the local board must establish a kindergarten program with all costs to be paid by the local district. Local boards are empowered to regulate the operation of the kindergarten program, and teachers must possess training in kindergarten education. After the kindergarten program has been in operation for two years, the local board may submit the question of its discontinuance to the electors, and upon the petition of twenty percent of the qualified electors of the district, must so submit the question of discontinuance.			
Ohio	Ohio Rev. Code Ann. § 3313.5 (1960); §§ 3301.16, 3317.03, 3317.05 (Supp. 1969).	1953		X
	Local boards may establish kindergarten programs funded from local sources as part of the elementary school program. The curriculum is to include training and supervision in music, arts, language, speech, government, and athletics.			
Oklahoma	Okla. Stat. Ann. tit. 70, § 1-7 (1966); Okla. Stat. Ann.	1966		X

State	Relevant Statutory Authorization	Date Enacted	Optional	Mandatory
	tit. 70, §§ 1-16, 2A-4 (Supp. 1970).			
	Local boards may establish kindergartens and nursery schools as part of the public school program for children who are not six years of age 1 November of the academic year. The State Department of Education is empowered to regulate and supervise teachers, classification, and inspection of the kindergarten programs in the public schools. Funding is provided the local boards by the state.			
Oregon	Ore. Rev. Stat. §§ 332.075, 336.105 (1969).	1965	X	
	Local boards may establish kindergarten programs for children ages four to six with funding provided by the local districts.			
Pennsylvania	Pa. Stat. 24 §§ 5-502, 5-503, 15-1501 (1962); §§ 25-2501, 25-2502 (Supp. 1970).	1911	X	
	Local boards may establish kindergarten programs as integral parts of the public school system for children ages four to six years with daily attendance to be two and one-half hours per day for one hundred eighty days. The program is to be closed if average attendance is less than ten children for any one year period.			
Rhode Island	R.I. Gen. Laws, Ann. §§ 16-2-2, 16-2-27, 16-7-16, 16-7-22 (1969).	1967		X
	As of 1969 the academic year, all towns must have established kindergarten programs in the public school systems to be operated for one hundred and eighty days annually for children of age five years by 31 December of the academic year.			
South Carolina	S.C. Code Ann. §§ 21-601, 21-602, 21-603 (1962).	1913	X	
	County boards of education may establish kindergarten programs as part of the public school system and funded accordingly except that no child under six years of age is to be included in computing the average daily attendance of the school. Eligible children are to			

State	Relevant Statutory Authorization	Date Enacted	Optional	Mandatory
	be from four to six years of age and teachers must have completed at least a two-year course in kindergarten education prior to certification.			
South Dakota	S.D. Comp. Laws §§ 13-13-3, 13-13-22, 13-28-3, 13-28-22 (1967).	1931	X	
	Local boards may establish kindergarten programs as part of the public school system for children of age one year younger than those eligible for elementary school.			
Tennessee	Tenn. Code Ann. §§ 49-2301, 49-2302, 49-2303 (1956).	1945	X	
	Local boards which operate elementary or secondary schools may establish kindergarten programs for children under the age of six years under the regulation of the state department of education. Local boards may receive federal and state funds for the operation of the kindergarten program, but no funds appropriated for grades one through twelve may be so applied.			
Texas	House Bill No. 240, 1970 Regular Session, Texas State Legislature.	1970		X
	The 1970 legislation amends the minimum program code provisions in Texas so as to provide for a mandatory kindergarten program within the state by increasing those funds to districts which provide kindergarten education.			
Utah	Utah Code Ann. §§ 53-7-16, (1970)	1953	X	
	Local boards may establish kindergarten programs for children of age five years with funding provided by the state. Teachers must pass a special examination in kindergarten education administered by the State Board of Education prior to certification, and all regulation of the kindergarten program is left to the local boards.			
Vermont	Vt. Stat. Ann. tit. 16, §§ 11, 563 (18), 3441 (Supp. 1970).	1949	X	
	Local town boards of education may submit the questions of a kindergarten to a regularly scheduled meeting of the town, at the board's discretion, until such time as the kindergarten unit has been established			

State	Relevant Statutory Authorization	Date Enacted	Optional	Mandatory
	in the district. The age of eligible children is six years and the schools are to be considered part of the public school system and funded accordingly.			
Virginia	Va. Code Ann. §§ 22-21, 22-218.2 (1969).	1958		X
	Local boards are authorized to perform all tasks necessary to stimulate and provide free public education, and provision is present for kindergarten programs to receive state aid as other grades, and to accept children who are five years of age on or before 30 September of the academic year.			
Washington	Wash. Rev. Code §§ 28A. 35.010 - 28A. 35.070. (1970).	1897		X
	Local boards may establish free kindergartens in the public schools for children age four to six years with funding for a three hour day to come from the general school fund of the state.			
West Virginia	W. Va. Code Ann. § 18-5-18 (1966).	1959		X
	Local boards may establish and finance kindergarten programs for children of the age four to six years and teachers must hold certificates based upon special training in the field of kindergarten education.			
Wisconsin	Wis. Stat. Ann. §§ 120.13 (14), 121.07 (W.S.A. *Public Instruction Special Pamphlet* 1970).	1959		X
	Local boards which operate elementary and/or secondary schools may establish kindergarten programs which constitute a school of the district, and these may not be discontinued until the previous year's enrollment is less than fifteen children in average daily attendance. State aid to these kindergarten programs is provided only for those pupils who reach the age of five years on or before 1 December of the academic year.			
Wyoming	Wyo. Stat. Ann. §§ 21.1-228, 21.1-27 (i), 21.1-58 (b) (Supp. 1969).	1955		X

State	Relevant Statutory Authorization	Date Enacted	Optional	Mandatory
	Local school boards may establish kindergarten programs for children of the age of five years on or before 15 September of the academic year. A kindergarten is defined as a class of pre-first grade students in a program authorized by a local board attending classes for one-half the regular day.			

THE ASSIGNED COUNSEL SYSTEM: AN EXERCISE OF SERVITUDE?

Parham H. Williams and William M. Bost, Jr.***

Neither slavery nor involuntary servitude shall exist within the United States. . . .

—U.S. CONST. amend. XIII

I. INTRODUCTION

There are those among us who regard the thirteenth amendment as a constitutional anachronism, a quaint relic of a nation's righteous revulsion against the enslavement of human beings. This simplistic notion is grounded on the assumption, deemed unassailable by those who embrace it, that "slavery" and "involuntary servitude" are terms relevant only to an historical consideration of a tragic era. To suggest to the proponents of this view that human bondage in any form still survives in this land of freedom and constitutional government is to suggest the ridiculous. And to intimate that a class of professional persons has been arbitrarily designated to suffer recurring terms of servitude is to speak nonsense. And yet—

These hallowed assumptions about the abolition of slavery and the demise of the thirteenth amendment as a viable constitutional provision are being challenged with increasing frequency by those who suggest that at least one class in American society—the legal profession—is the victim of governmentally sanctioned servitude. So venerable an authority as the Mississippi Judiciary Commission, in its recent *Report*,[1] recommended legislation to provide an adequate defense for the indigent "without subjecting the attorneys to what amounts to involuntary servitude."[2] And a popular legal periodical recently published an article entitled "Slave Labor in the Court—A Suggested Solution."[3]

Of course, the "bondage" which concerned the Commission and the commentator is not accompanied by the cracking of an overseer's whip

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[1] MISSISSIPPI JUDICIARY COMMISSION, REPORT OF THE MISSISSIPPI JUDICIARY COMMISSION TO THE 1970 REGULAR SESSION OF THE LEGISLATURE OF THE STATE OF MISSISSIPPI (1970) [hereinafter cited as COMMISSION REPORT].

[2] *Id.* at 33.

[3] Hunter, *Slave Labor in the Courts—A Suggested Solution*, 74 CASE & COMMENT 3 (1969).

or the haunting refrains of *Ole Man River*. Rather, their indignation is directed to a more subtle form of servitude: the judicially countenanced system of requiring lawyers to serve, either with nominal compensation or without compensation, as defense counsel for indigents charged with crimes.

This system, despite the hardships which it apparently imposes[4] on the class selected for servitude, is the primary means of providing representation for persons charged with crimes in the majority of state courts[5] and in the federal jurisdiction.[6] It is a simple and, as operated in Mississippi,[7] a relatively inexpensive method of implementing the *Gideon* mandate.[8] In essence, when a person is charged with, or indicted for, a felony offense and desires a lawyer but is unable to hire one, the trial judge will appoint one to represent him from among the membership of the bar in that county.

Mississippi has employed the assigned counsel system, with only minor variations, since territorial days.[9] The early statutes directed the court to appoint counsel for a person indicted for a capital crime "immediately upon his or her request."[10] It was not until after the Civil War that the legislature required a showing of indigency as a condition

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[4] A survey conducted by the author in 1966 indicated that ninety-three percent of those lawyers responding to a questionnaire felt that the fee allowance for assigned counsel constituted a hardship on the attorney. Williams, *The Criminal Versus Society: Some Observations on the Accommodation of Mississippi Criminal Procedure to the Evolving Concepts of "Constitutionalized" Due Process*, 38 MISS. L.J. 254, 270 (1967).

[5] The assigned counsel system, in one form or another, is presently operative in approximately twenty-nine hundred of the thirty-one hundred counties in the United States, 1 SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 15 (1965).

[6] Criminal Justice Act, 18 U.S.C. § 3006A (1964).

[7] *See* COMMISSION REPORT, *supra* note 1, at 33.

[8] Gideon v. Wainwright, 372 U.S. 335 (1963), requires that every indigent person charged with a felony in the state courts be provided, if he so desires, with counsel to represent him.

[9] The earliest statute authorizing the appointment of counsel for a person indicted for a capital crime was apparently contained in the Act of February 10, 1807, published in the DIGEST OF THE STATUTES OF THE MISSISSIPPI TERRITORY, pt. 6, ch. 1, § 47 (1807). This statute provided, in pertinent part:

> That any person, who shall be indicted for any capital crime . . . shall be allowed and admitted to make his full defense, by counsel, learned in the law. And the court before whom such person shall be tried, or some judge thereof, shall immediately upon his or her request, assign to such person such counsel, not exceeding two, as such person shall desire; to whom such counsel shall have free access at all seasonable hours . . .

[10] *See, e.g.*, POINDEXTER'S REVISED CODE OF THE LAWS OF MISSISSIPPI, ch. 54, § 49 (1823).

to the appointment.[11] No provision for compensation was made until 1934 when the statute[12] was amended to provide that appointed counsel "shall receive an amount not less than twenty-five ($25.00) dollars and not more than fifty ($50.00) dollars, as expenses, in the discretion of the trial court, to be paid under order of the court by the board of supervisors of the county where the indictment is found."[13]

The current statute[14] provides a specific schedule of fees to be allowed appointed counsel, the amount thereof depending upon the final disposition of the case.[15] In view of the current inflated economy, the fee schedule provided can hardly be considered as more than token payment for the training, experience, and many hours of preparation necessary to conduct an adequate defense in a criminal case.[16]

The mechanical operation of the assigned counsel system in Mississippi has been comprehensively analyzed in a previous article in the *Mississippi Law Journal*[17] and in the recent *Report* of the Mississippi Judiciary Commission.[18] These studies indicate a number of deficiencies in the system and in its implementation; the most damaging, moreover, relate to the inadequacy of compensation and to the absence of authorization to reimburse the necessary expenses of preparing an adequate defense. These deficiencies may arguably assume constitutional dimensions because, in a very real sense, they affect the quality of the defense which is provided the indigent. And, because they may assume constitutional proportions, these deficiencies often operate to provide the grounds for endless, embittering, and expensive post-conviction litigation. It may well be that the indirect "costs" of our failure to adequately compensate assigned counsel and to provide funds for the preparation of a defense outweigh the actual monetary cost of furnishing such assistance.

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[11] HUTCHINSON'S MISSISSIPPI CODE § 2758 (1871).

[12] MISS. CODE § 1262 (1930).

[13] MISS. GEN. LAWS ch. 303 (1934).

[14] MISS. CODE ANN. § 2505 (1956).

[15] The following schedule obtains:

For final settlement of the case without trial after indictment	$ 75.00
For final conclusion of the case by trial, either upon the merits or the issue of insanity	150.00
For final conclusion of the case on appeal to and decision by the State Supreme Court	250.00
In non-capital felonies the respective fees are: $50.00; $100.00; $200.00	

[16] A review of relevant statistics in the fifty state jurisdictions indicates that only two, Arkansas and West Virginia, statutorily authorize less compensation than Mississippi. *See* ARK. STAT. ANN. § 43-2415 (1964); W. VA. CODE ANN. §§ 49-6-5 (Supp. 1969), 62-3-1 (Supp. 1967).

[17] Williams, *supra* note 4.

[18] COMMISSION REPORT, *supra* note 1.

II. The Cost of Our Failure to Adequately Compensate Appointed Counsel and to Provide Necessary Expenses

There are at least three identifiable parties who bear the indirect "costs" of our failure to provide expense funds and adequate compensation to assigned counsel: the lawyer who is appointed, the indigent client, and the weary taxpayer. Few will quarrel with the inclusion of appointed counsel in this schedule; the listing of the client and the taxpayer, however, may provoke considerable disagreement. Nevertheless, it is submitted that in occasional cases the deficiencies of the assigned counsel system do operate to deny the indigent defendant the "effective" assistance of counsel in the preparation and presentation of his defense—thereby "costing" him in a very real sense. When this denial occurs, it is inevitable that some later reviewing court, either upon an appeal or in a collateral proceeding, will order a new trial.

The costs to the state of responding to the individual post-conviction claim and of re-trying the original case are substantial. And the fact that reviewing courts occasionally grant relief in meritorious cases encourages the filing of hundreds of frivolous claims.[19] The expense, in money and manpower, of responding to these claims may assume a magnitude unsuspected by the average taxpayer and legislator. It is reasonable to suggest, therefore, that lawyer, client and taxpayer each bear a significant portion of the "costs" of an inadequate system of representation.

Admittedly, these costs are more easily identified than measured. However, certain observations will be helpful in understanding the pervasive consequences of the failure to provide adequate assistance to the indigent defendant.

A. The Cost to the Lawyer

To place in proper perspective the financial hardship visited on a lawyer by an appointment, it is helpful to recall that the obligation to serve arose in a time when economic conditions were quite different from those existing today. When the Territorial Legislature enacted the statute requiring lawyers to provide free representation to persons indicted for capital crimes,[20] the preparation and trial of a criminal

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[19] In *Gray v. United States*, 299 F.2d 467 (D.C. Cir. 1961), the court, after reviewing the large number of frivolous post-conviction petitions which charged ineffectiveness of assigned counsel, concluded:

> The charge of ineffective assistance is so often leveled at appointed counsel by convicted defendants that many lawyers dislike to accept assignments in behalf of indigents. Such a charge should not be sustained unless it very clearly appears to be well grounded. [*Id.* at 468.]

[20] *See* note 9 *supra*.

case were unbelievably simple, especially when compared with the complexities of contemporary criminal procedure. There were no federal constitutional restraints on the state criminal courts,[21] and the frontier defense counsel was therefore untroubled by that vast corpus of law, ranging from "arrest" to "waiver," which his modern colleague must know and utilize.

The early lawyer had no expensive secretarial staff to support, and his library usually consisted of the state code and perhaps a few volumes of reports. There were no telephone bills to pay, no automobiles to finance, no law book publishers to endlessly subsidize, and no typewriters, dictaphones or copying machines to purchase. Probably the only expenses directly chargeable to his business were office rent and hay for his horse. With no overhead to meet, the early lawyer suffered little measurable financial hardship by virtue of uncompensated service. Indeed, this happy condition has existed throughout most of our history as a state; only in recent times have we lawyers become convinced that the successful practice of law requires the purchase of every new book and gadget produced by our ingenious technology.

The fact remains, however, that the overhead of the average contemporary law office equals about forty percent of gross income.[22] Assuming that the practitioner must produce from five to twenty dollars each working hour just to pay his business expenses, he necessarily donates this amount to the county each hour he devotes to preparing and trying an appointed case. In addition, he also contributes to the county the profit which he would have realized from fee-paying cases during his period of servitude. Of course, the lawyer also donates the out-of-pocket expenses which he incurs while investigating and preparing the case.

The total "donations" of the assigned counsel, frequently substantial, occasionally assume ruinous proportions. In *People v. Randolph*,[23] five Illinois attorneys were appointed to defend four prisoners alleged to have murdered three guards in a prison riot. The case was extraordinary in its complexity and duration.[24] After four

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[21] *See generally* Palko v. Connecticut. 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908).

[22] State v. Rush, 217 A.2d 441, 448 (N. J. 1966).

[23] 25 Ill. 2d 24, 219 N.E.2d 337 (1966).

[24] Voir dire lasted nine weeks, during which time one thousand fifty veniremen were questioned. In the four weeks of trial prior to the attorney's motion for fees and expenses, the prosecution called sixteen witnesses and indicated its intention to call an additional sixty to one hundred witnesses. Further, the defense attorneys were forced to live away from their homes during the trial since they resided a distance of one hundred fifty miles from the scene of the trial.

weeks of trial and the attendant out-of-pocket expenses, several of the defense attorneys were "suffering an extreme, if not ruinous, loss of practice and income. . . ."[25]

At this point, the five lawyers filed a motion requesting some $31,000 in expenses and fees. The trial court ordered payment, but the county certified its inability to pay. Although compensation was limited to $500 per case by statute,[26] the Illinois Supreme Court ultimately held that the statute could not be constitutionally applied where it appears that appointed counsel cannot continue to serve because of the extreme financial burden of the case. The state was held liable for the fees and expenditures of the defense lawyers and was ordered to pay the entire sum sought.[27]

The appointed lawyer suffers an additional, and probably immeasurable, financial deprivation from "lost cases" — those clients who end up with another lawyer because assigned counsel is working on a criminal case and thus is unavailable. A recent Nevada case, *Brown v. Board of County Commissioners*,[28] illustrates the financial hardships often encountered by a lawyer who practices alone. Appointed to represent a defendant charged with a non-capital felony, the defense attorney devoted himself in a dedicated and highly commendable manner to the interests of his client.

Unfortunately, however, the dedication to duty was costly. The length and complexity of the trial required the appointed lawyer to associate other counsel to handle certain of his pending civil matters; defense counsel was unable to see his own fee-paying clients for over two months; he lost several regular clients; and, in perhaps the unkindest cut of all, he was compelled to return retainers in excess of $1,000.[29] The Nevada Supreme Court, assuming a much less sympathetic stance than the Illinois Court in *Randolph*, held that the circumstances were not sufficiently "extraordinary" to justify compensation in excess of the statutory maximum of $300.[30]

Another factor, admittedly difficult to ascertain, arises when the lawyer is appointed to represent an indigent who is unpopular or who has committed a heinous crime. The defense of this sort of case sometimes produces a loss of clients and, occasionally, some degree of social

[25] 219 N.E.2d at 341.

[26] ILL. REV. STAT. ch. 28, § 113-3 (1967).

[27] Under the State Penitentiary Act, ILL. REV. STAT. ch. 108, § 118 (1967), the state, not the county, must bear the cost of prosecuting convicts for crimes committed within the penitentiary system.

[28] 451 P.2d 708 (Nev. 1969).

[29] *Id.* at 709.

[30] NEV. REV. STAT. § 7.260 (1967).

ostracism. Of course, the losses would occur whether the lawyer were appointed or employed, but the assurance of adequate compensation somehow renders them much more palatable.

In short, the appointment to a case generally means that the lawyer will lose, in actual out-of-pocket expenses and in the donation of services to the county, an amount ranging anywhere from a few hundred dollars to several thousand dollars, depending on the nature and complexity of the case.

B. The Cost to the Client

As previously noted, the deficiencies in the assigned counsel system can operate to deny an indigent defendant the effective assistance of counsel. This proposition is neither inane nor tenuous (as some may suggest) and can be readily demonstrated. The deprivation actually derives from two distinct but interrelated factors: (1) the quality of interest invested in the case by defense counsel, and (2) the limited resources available for the preparation of the defense. A few observations will illustrate the effects of these two factors.

Slave labor is notoriously inefficient labor. Whether toiling in the cotton fields of the Old South or in the salt mines of Siberia, the slave, devoid of incentive and steeped in bitterness, does not produce work of the same quality as does the free artisan or laborer. The essential difference lies in the incentive possessed by each worker. The proposition that monetary reward is perhaps the most powerful incentive to efficient work is hardly arguable. This proposition translates just as readily into the performance of legal work as into any other vocation. Lawyers, with rare exceptions, practice law to make money.

If there remain any lingering doubts about the conclusion that handling appointed cases is an unprofitable business, the recent *Report*[31] of the Mississippi Judiciary Commission should lay them to rest. The 1966 study[32] of the assigned counsel system in Mississippi showed a total of 710 appointments with an average fee per case of $55.68.[33] The Commission *Report*, analyzing the system during the year 1968, showed that the number of appointments had increased to 1,089 but that the average fee per case had *declined* to $48.52, a decrease of $7.15 per case in two years.[34] Obviously, no lawyer who performs conscientiously on behalf of his indigent client can expect to make money from the appointment, and therein lies the potential for inadequate representation.

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[31] COMMISSION REPORT, *supra* note 1.

[32] Williams, *supra* note 4.

[33] Williams, *supra* note 4, at 267.

[34] COMMISSION REPORT, *supra* note 1.

Lawyers are human beings, blessed or cursed with the same virtues and vices which are the heritage of all men. One of these attributes—shared in common with other professionals—is an interest in performing work which will produce income and a non-interest in executing functions which will lose money. Perhaps we are unrealistic when we assume that lawyers, unlike any other professional group, will invest the same quality of interest in an appointed case as in a fee-paying matter.[35]

This lack of interest (or incentive) may[36] occasionally produce representation of questionable efficacy, thus providing the unhappy client (now a convict) with a ready ground for contending, in a post-conviction proceeding,[37] that his lawyer's incompetence operated to deny petitioner due process of law. These allegations, filed months and sometimes years after the original representation, are difficult to defend and are often damaging to the professional reputation of the lawyer. The gravamen of the contention is that the appointed lawyer, either through ignorance or neglect, failed to perform competently in representing his client. Convicts have a great deal of time to brood about supposed incompetency on the part of their former counsel, and they often display considerable ingenuity in framing their charges. Typical allegations range from the failure of counsel to adequately prepare the case[38] to failure to prosecute an effective appeal.[39] Generally, the conduct of counsel must have been exceptionally poor in order to be classed as "ineffective."[40] In *Williams v. Beto*[41] the Fifth Circuit Court of Appeals stated the following test by which such conduct is to be judged:

> [R]elief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial

[35] Obviously, this is a simplistic approach to a highly complex problem. Most appointed lawyers render loyal and effective service to their clients. There are exceptions, however, and it is these exceptions which provide the grist for the appellate court mills. *See, e.g.*, Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968), *cert. denied*, 393 U.S. 849 (1968); Stewart v. State, 229 So. 2d 53 (Miss. 1969).

[36] The term "may" is deliberately employed because the earlier study of the assigned counsel system indicated that, at least in Mississippi, appointed counsel more than held their own with retained counsel in negotiating pleas to lesser offenses. The study also indicated that most of the circuit judges thought that assigned counsel's preparation of the case was either "adequate" or "very adequate." Williams, *supra* note 4, at 268.

[37] Usually by filing a petition for a writ of habeas corpus in a United States District Court under the provisions of 28 U.S.C. §§ 2241-54 (1964).

[38] *See, e.g.*, Cross v. U.S., 392 F.2d 360 (8th Cir. 1968) wherein it was alleged that defense counsel failed to issue a subpoena for a person described as a critical defense witness.

[39] Anders v. California, 386 U.S. 738 (1967).

[40] *See, e.g.*, Stewart v. State, 229 So. 2d 53 (Miss. 1969).

[41] 354 F.2d 698 (5th Cir. 1965).

> was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation.[42]

The principal case in Mississippi is *Stewart v. State*,[43] wherein the defendant was indicted for rape. His attorney agreed to a plea of guilty, and a jury was impaneled to determine the sentence. Defense counsel conducted no voir dire examination of the prospective jurors, and although several knew about the case, he did not challenge any juror for cause. The prosecutor then introduced a number of witnesses who testified in detail. Although the district attorney asked a number of leading questions, defense counsel interposed no objections thereto. He waived all cross examination of the prosecution witnesses and offered no witnesses for the defense. Upon conclusion of the testimony, defense counsel failed to request a single instruction on behalf of the defendant. The jury promptly returned a verdict of "guilty as charged."[44]

After reviewing this sad record, the Mississippi Supreme Court concluded that Stewart was not adequately represented and that the ineffectiveness of his counsel denied him due process of law as required by the Mississippi Constitution.[45] In reversing the conviction, the court suggested the following procedure for the guidance of trial courts in similar situations:

> [W]hen the case has progressed to a point when it is apparent, or should be apparent, that the attorney for the defendant is either incompetent or is doing nothing to represent the interest of the defendant, the court should take such appropriate action as may appear to be necessary to insure the defendant a fair trial. He may appoint additional counsel or grant a new trial or take such other appropriate action necessary within his sound judicial discretion.[46]

Standards prescribing the duties of appointed counsel are difficult to formulate; each case demands tactics appropriate to its unique facts. Occasionally, however, a court ventures to structure guidelines which may prove helpful to the wary lawyer appointed to represent a distrustful client. *Coles v. Peyton*[47] produced one such formulation:

> Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable time to prepare to defend an accused. Counsel must confer with his client

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[42] *Id.* at 704.

[43] 229 So. 2d 53 (Miss. 1969).

[44] *Id.* at 54.

[45] MISS. CONST. art. III, § 14.

[46] 229 So. 2d at 56.

[47] 389 F.2d 224 (4th Cir. 1968).

> without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial. An omission or failure to abide by these requirements constitutes a denial of effective representation of counsel. . . .[48]

The quality of interest invested in the case by defense counsel is inexorably reflected in the quality of service which he renders to his client. This factor alone may be sufficient condemnation of the system of "representation without compensation."

There is another factor, however, which is correlative to the first: appointed counsel is generally denied access to those resources necessary to adequately prepare a defense. The impact of this factor on the constitutional balances should be obvious, but a few comments may be appropriate.

The foundation of the criminal justice system in this country is the "adversary principle." Under this principle, each side in the trial of a case attempts to convince the jury that its version of the facts is the correct one. After hearing the evidence and receiving instructions concerning the applicable law, the jury determines the issue of guilt or innocence. Theoretically this principle is valid and, assuming the two sides to be equal in skill and resources, should produce the proper verdict in most cases. Realistically, however, the system occasionally breaks down because the two sides are unequal, and thus the jury receives a biased or incomplete version of the facts. This inequality is usually the result of the inherent imbalance between the resources available to the prosecution and those available to the defendant.

In preparing his case, the prosecutor receives the investigative assistance of the local police and sheriff's department, the state highway patrol, and often the Federal Bureau of Investigation. The facilities of the Mississippi Crime Laboratory and the FBI laboratory are available for the analysis of scientific evidence; the state mental hospital provides expert psychiatric evaluation and testimony. As a consequence, when the prosecutor announces "ready for trial," he is armed not only with his own considerable skill and experience but with the support and resources of a vast array of state and federal agencies.

If the defendant is financially able, he can hire private investigators to assist his lawyer in securing the facts; he can buy the services of experts in chemistry, ballistics, and psychiatry. In short, by the expendi-

[48] *Id.* at 226.

ture of enough money, the wealthy defendant can achieve that parity of resources which the adversary system demands.

The poor man, however, can obviously afford to purchase none of these resources which his appointed counsel often desperately needs in order to prepare an adequate defense.[49]

The indigent's right to assistance in addition to counsel has not been generally recognized,[50] and only in recent years have a few courts sought to provide necessary resources to appointed counsel.[51] The decisions have generally been grounded on the constitutional bases of "right to counsel"[52] and "due process of law."[53]

An important case is *Bush v. McCollum*,[54] wherein the federal district court held that the denial, in a Texas state court, of an indigent defendant's motion to provide funds for psychiatric services constituted a violation of the defendant's due process rights under the fourteenth amendment.[55] The court concluded that:

> [T]he right to counsel is meaningless if the lawyer is unable to make an effective defense because he has no funds to provide the specialized testimony which the case requires. . . . In order for Bush . . . to have the effective aid of counsel, it was necessary for his counsel to have the effective assistance of a qualified psychiatrist. . . .[56]

The issue was presented to the Mississippi Supreme Court in *Phillips v. State*,[57] wherein appointed counsel, upon learning that his client had a history of mental disorder, filed a pre-trial motion requesting the

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[49] *See, e.g.*, Phillips v. State, 197 So. 2d 241 (Miss. 1967) wherein appointed counsel unsuccessfully sought the services of a psychiatrist in order to determine the competency of his client at the time of the commission of the crime.

[50] *See generally* Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054 (1963). The right was accorded the federal court defendant by the enactment of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1964). The Act authorizes appointed counsel to obtain investigative, expert, and other services necessary for an adequate defense, and provides compensation not to exceed $300 for such service.

[51] *See, e.g.*, Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965) (psychiatric services); People v. Watson, 26 Ill. 2d 228, 221 N.E.2d 645 (1966) (services of questioned document examiner).

[52] U.S. CONST. amend. VI.

[53] U.S.CONST. amend. XIV.

[54] 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965).

[55] 231 F. Supp. at 564.

[56] *Id.* at 565. It is interesting to note that in its *per curiam* affirming opinion, the Fifth Circuit Court of Appeals emphasized that the action of the state court "denied Bush both a fair trial *and the effective assistance of counsel.*" (emphasis added). McCollum v. Bush, 344 F.2d 672 (5th Cir. 1965).

[57] 197 So. 2d 241 (Miss. 1967).

court to provide a psychiatrist to determine the accused's mental capacity at the time of the crime. Conceding that his client was presently competent and able to stand trial,[58] counsel argued in his motion:

> Without advice from a qualified psychiatrist who has been afforded the opportunity and the time to examine the defendant, and to confer with defendant's counsel, counsel cannot determine the necessity, advisability, or propriety of a plea of not guilty by reason of insanity, nor whether or not the Defendant had at the time of the commission of the alleged offense the mental capacity to form the necessary criminal intent to commit the crime charged; counsel's ability to render the Defendant an adequate and effective legal defense . . . depends upon counsel's being able to obtain psychiatric information about his client.[59]

The motion was denied, the defendant was tried and convicted, and the denial of the motion was assigned as error on the appeal to the Mississippi Supreme Court. The critical question in the case was whether or not the indigent defendant receives "effective assistance of counsel" if his lawyer is unable to obtain the expert assistance necessary to the adequate preparation of a defense. The Mississippi Supreme Court avoided a consideration of this question and concluded:

> Neither the United States Constitution nor the Mississippi Constitution requires that the Nation or State furnish an indigent defendant with the assistance of a psychiatrist. The only assistance that they require is the assistance of legal counsel.[60]

The rationale of *Phillips* was employed again in the recent case of *Laughter v. State*[61] in which the defendant was indicted for the crime of possession of marijuana. The lower court denied defendant's motion requesting funds for the services of a chemist and a private investigator, and this denial was assigned as error on the appeal. The court summarily rejected this proposition:

> [T]here is no merit in appellant's final contention that [he] should have been allowed a private investigator and a chemist at the state's expense. There is no precedent for this and therefore it is disallowed.[62]

As evidenced by *Phillips* and *Laughter*, the Mississippi Supreme

[58] MISS. CODE ANN. § 2575.5 (1956) authorizes the trial court, upon motion by the defendant, the prosecutor, or the judge, to order the defendant examined by a psychiatrist "to determine his ability to make a defense." There is no statutory provision authorizing an examination, on behalf of the defendant, to determine his competency at the time of the alleged crime.

[59] 197 So. 2d at 242.

[60] 197 So. 2d at 244.

[61] 235 So. 2d 468 (1970).

[62] *Id.* at 472.

Court has adopted a strict interpretation of the sixth amendment right to the "assistance of counsel." This view, while in accord with the majority rule, fails to recognize the essential fact that the indigent defendant does not receive effective legal assistance unless his lawyer possesses the knowledge and means to prepare an adequate defense.

In our increasingly complex society, it is impossible for any one person to know more than a pitifully small percentage of the vast store of facts which man's technical genius has generated. We lawyers pride ourselves on being generalists, knowledgeable about every field of the law. But even the most prideful among us would be quick to confess that we possess no professional competence outside the law.

In preparing a criminal case which requires specialized knowledge in a non-legal discipline, we must employ the services of an expert in that field. If our client is wealthy, we can employ as many experts as are needed to prepare the case; if he is poor, we are unable to purchase the necessary specialized knowledge. To the extent that the appointed lawyer is unable to obtain the special information necessary to frame a defense or to advise his client, the poor man is denied the effective assistance of counsel.

The issue was most ably summarized by appointed counsel in the *Phillips* case when he argued:

> Most of the time the appointment of an experienced attorney who is given ample time to prepare his case is sufficient; but this is not all that the Sixth Amendment means. In those rare cases in which an attorney, by himself, cannot discharge [his] . . . responsibilities without assistance from a specially trained expert, then the Sixth Amendment is violated by the failure of the court to permit the attorney to have the assistance or information needed to do the very thing the court appointed him to do.[63]

III. Efforts to Achieve Reform Through Legislation

As early as 1965, the President of the Mississippi State Bar appointed a Public Defender Committee and requested it to perform a study of the various methods of providing representation for indigents and to propose appropriate legislation. The report of this committee, the several proposed bills, and their treatment by the Mississippi Legislature, are carefully recounted in a previous issue of this *Journal*.[64] No useful purpose would be served by a re-examination of the history of these efforts. It is important to note, however, that the Mississippi Judiciary

[63] Brief for Appellant at 10, Phillips v. State, 197 So. 2d 241 (Miss. 1967).

[64] Wise, *Right to Counsel for Indigent Defendants in Mississippi*, 40 Miss. L.J. 187 (1969).

Commission, after a comprehensive study, recommended sweeping reform of the present assigned counsel system.[65]

Specifically, the Commission proposed the creation of a State Public Defender Office to handle indigent criminal appeals and post-conviction proceedings. In addition to his appellate duties, this officer would maintain brief banks and would provide research assistance to court appointed lawyers at the trial level.[66]

The commission further proposed revisions of the assigned counsel system which would largely remedy the more serious deficiencies. First, appointments would be limited to a panel of attorneys selected by the circuit judge on the basis of their interest and experience in criminal defense work. Second, the scope of representation would be expanded to include misdemeanors punishable by confinement and delinquency matters, as well as all felonies. Third, the compensation provisions are drastically revised and provision is made for paying appointed counsel fifteen dollars per hour for time spent in representing the indigent, plus actual expenses. Finally, the trial court is authorized to allow the employment of an investigator in any felony case, with compensation to be fixed by the court, but not to exceed three hundred dollars.[67]

Legislative enactment of these proposals would accomplish several important goals: appointed counsel would receive a reasonable fee for his services; the indigent would be accorded more effective representation; and, from a pragmatic viewpoint, many of the grounds upon which post-conviction complaints are based (incompetent counsel, ineffective counsel, denial of expert services, etc.) would be eroded. This last factor could substantially reduce the number of post-conviction petitions filed by disgruntled convicts and ultimately produce a measurable savings for the weary taxpayer. Because of the importance of the commission proposals, the recommended legislation is included in Appendix I to this article.

IV. Efforts to Achieve Reform Through Litigation

A. Theories of Compensation

Lawyers are extremely resourceful people, accustomed to viewing the world through the eyes of an advocate, and quick to recognize injustice in any form, particularly when it affects their own interest. It is not at all surprising, therefore, that some of the more ingenious legal arguments of the last decade have been directed toward accomplishing a

[65] *See* Commission Report, *supra* note 1, at 33.
[66] *See* Appendix I *infra*.
[67] *Id.*

judicial amelioration of that major deficiency in the assigned counsel system—the failure to provide adequate compensation.

These efforts have been confronted at the outset with the generally recognized principle that in the absence of a statute or court rule, appointed counsel has no right to compensation by the public.[68] Accordingly, the claimants have relied on a variety of legal theories—some sound, some ludicrous—in their efforts to convince the courts that adequate compensation should be judicially ordered. Some of the more interesting arguments are that uncompensated assignments deprive counsel of property without due process under the fifth amendment;[69] unpaid counsel does not perform effectively and thereby deprives his client of the sixth amendment right to counsel;[70] there is an implied contract to compensate an attorney who has been directed to serve an indigent by a court;[71] counties are required to pay appointed counsel under the provisions of a statute requiring them to bear "the cost of criminal prosecution;"[72] and assignment without compensation constitutes involuntary servitude in violation of the thirteenth amendment.[73]

Of the several theories advanced, only two have received more than cursory consideration by the courts. They are (1) the proposition that the requirement of uncompensated professional service constitutes a "taking" of the lawyer's property in violation of the fifth and fourteenth amendments,[74] and (2) the claim that counties are required to pay appointed counsel under the general authority of a statute or constitutional provision requiring them to pay the costs of prosecuting criminal cases.[75] The rationale of the decisions rendered in response to these claims is worthy of comment.

B. Appointment as Constituting a "Taking" of Property

At first blush, this theory appears to be sound and should arouse righteous indignation from every lawyer who thinks he has been stripped of property by an appointment. The syllogism is reasonable: the right to practice law is a property right within the meaning of the due process

[68] *See generally* United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); State v. Clifton, 247 La. 495, 172 So. 2d 657 (1965); Dismukes v. Board of Supervisors, 58 Miss. 612 (1881).

[69] United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

[70] State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966).

[71] Weiner v. Fulton County, 113 Ga. App. 343, 148 S.E.2d 143 (1966), *cert. denied*, 385 U.S. 958 (1966).

[72] Abodeely v. County of Worcester, 352 Mass. 719, 227 N.E.2d 486 (1967).

[73] State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966).

[74] Weiner v. Fulton County, 113 Ga. App. 343, 148 S.E.2d 143 (1966).

[75] State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966).

and equal protection provisions of the fourteenth amendment;[76] The United States Constitution[77] and state constitutions[78] prohibit the sovereign from taking private property without due compensation. Conclusion: requiring a lawyer to perform professional services without compensation is an unconstitutional taking of private property.

As reasonable and logical as this theory may appear, it nevertheless has apparently been rejected by every court which has considered it.[79] The possible exceptions occurred in Indiana, Iowa, and Wisconsin more than a hundred years ago. In the early case of *Webb v. Baird*[80] the Indiana court recognized that appointed counsel have a non-statutory right to compensation. This holding was apparently grounded on a provision of the state constitution which stated that "no man's particular services shall be demanded without just compensation."[81] In Iowa an early case[82] considered the effect of a statute requiring the appointment of counsel for paupers in criminal cases but making no provision for payment. The court concluded that under the principles of the fifth amendment the attorney was constitutionally entitled to compensation.[83] Less authoritative is the Wisconsin case of *Dane County v. Smith*,[84] holding that under the principles of just compensation the power and duty to compensate appointed counsel necessarily arises from the power to appoint.

The majority position, however, rejects the rationale of the Indiana, Iowa, and Wisconsin decisions. The principal case expressing the majority view is *United States v. Dillon*,[85] wherein an attorney was appointed by a federal district court to represent an indigent in a post-conviction proceeding. Such appointment and service being prior to the enactment of the Criminal Justice Act of 1964,[86] counsel was entitled to no compensation. Invited by the court to do so,[87] he filed a claim for compensation and was rewarded with an order directing payment of a fee in the amount of $3,804.54. This district court order was grounded

[76] Konigsberg v. State Bar, 353 U.S. 252 (1957).

[77] U.S. CONST. amend. V, XIV.

[78] *See, e.g.*, MISS. CONST. art. 3, § 17.

[79] *See* cases cited in Weiner v. Fulton County, 113 Ga. App. at 347-48, 148 S.E.2d at 146; Abodeely v. County of Worcester, 352 Mass. 719, 227 N.E.2d at 489 (1967).

[80] 6 Ind. 13 (1854).

[81] IND. CONST. art. 1, § 21.

[82] Hall v. Washington County, 2 Greene 473 (Iowa 1850).

[83] This holding was attenuated by the later case of Samuels v. County of Dubuque, 13 Iowa 536 (1862), which held that a statute limiting compensation to $25 did not violate the just compensation clause of the state constitution.

[84] 13 Wis. 585 (1861).

[85] 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

[86] 18 U.S.C. § 3006A (1964).

[87] U. S. v. Dillon, 346 F.2d at 634.

on a finding that the appointment constituted a taking of the lawyer's property for a public use, and just compensation was therefore payable.[88]

The Ninth Circuit Court of Appeals chose to dispose of the matter on the principle that there is no "taking" of property when a lawyer is required to perform professional services for an indigent. The court reached this conclusion after an exhaustive consideration of the traditions of the legal profession relating to uncompensated service.[89] "The obligation of the legal profession to serve indigents," the court found, "is an ancient and established tradition."[90] The court continued:

> [R]epresentation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court. . . . An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining. . . . Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services."[91]

Having concluded that there was no "taking" of the lawyer's property, the court found it unnecessary to consider whether the services rendered constituted "property" under the fifth amendment.[92]

Although a plausible extension of a venerable tradition, the *Dillon* decision, when viewed in the light of contemporary conditions, is at best unsatisfactory. In particular, the argument that a young lawyer agrees to provide free service as a condition to the issuance of his license seems to have a hollow ring. Most professional occupations today are subject to a licensing requirement. In Mississippi, for example, more than two dozen professional groups are required to obtain some sort of license or certificate in order to practice in the state. Among them are barbers,[93] cosmetologists,[94] dentists,[95] embalmers,[96] physicians,[97] public accountants,[98] and veterinarians.[99]

One need possess but little imagination to visualize the clamor that would arise if the *Dillon* rationale were applied to the groups mentioned

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[88] *Id.*
[89] *Id.* at 636, Appendix.
[90] *Id.* at 635.
[91] *Id.*
[92] *Id.* at 636.
[93] MISS. CODE ANN. § 8729 (1956).
[94] MISS. CODE ANN. § 8915-05 (1956).
[95] MISS. CODE ANN. § 8746 (1956).
[96] MISS. CODE ANN. § 8787 (1956).
[97] MISS. CODE ANN. § 8878 (1956).
[98] MISS. CODE ANN. § 8905 (1956).
[99] MISS. CODE ANN. § 8914-11 (1956).

above. What consequences would flow from a decision that barbers, for example, are required as a condition of licensing to provide free haircuts to indigents, or that cosmetologists must coiffure the locks of indigent ladies, or that embalmers are required to perform the rituals of their arcane profession upon the corpses of late indigents? It is interesting to speculate on the response of these groups, but it is safe to conclude that none of these professions would accept such a decision with the resignation which has characterized the reaction of the legal profession to *Dillon* and similar cases.

C. Compensation Authorized Under General Authority of Statute or Constitutional Provision

The general law of most states requires the individual county to bear all costs of prosecuting criminal cases within its jurisdiction.[100] A typical provision is section 261, Mississippi Constitution, which provides in pertinent part: "The expenses of criminal prosecutions shall be borne by the county in which such prosecution shall be begun. . . ."[101]

The "expenses of criminal prosecutions" generally include such items as witness fees,[102] jury fees,[103] clerk's fees,[104] sheriff's fees,[105] and many similar expenditures necessary for the functioning of the court. In Mississippi the general authorization also includes, within the limits imposed by section 2505,[106] the costs of compensating assigned counsel in felony prosecutions.

Prior to 1963 little consideration was given to the concept that the "costs of prosecution" should also include compensation for counsel assigned in matters not specifically covered by statute, e.g., representation in felony cases which terminate prior to indictment, representation of misdemeanants, and representation in juvenile matters. 1963 produced the *Gideon* decision, however, which greatly expanded the requirement of providing counsel in state felony cases.

This was followed by decisions requiring the appointment of counsel for indigents at the interrogation stage of the process,[107] in mis-

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[100] *See, e.g.*, MASS. GEN. LAWS ch. 277, § 869; ch. 280, § 884-5 (1932); N.J. STAT. ANN. § 2A: 158-7 (1951).

[101] MISS. CONST. art. 14, § 261.

[102] MISS. CODE ANN. § 3957 (1956).

[103] MISS. CODE ANN. § 3960 (1956).

[104] MISS. CODE ANN. §§ 3934-35 (1956).

[105] MISS. CODE ANN. §§ 3936-37 (1956).

[106] *See* schedule of fees, note 15 *supra*.

[107] Miranda v. Arizona, 384 U.S. 436 (1966).

demeanor cases,[108] in juvenile matters,[109] at the preliminary hearing,[110] and at revocation of probation hearings.[111] Consequently, lawyers are now subject to appointment in many matters for which there is no specific statutory authorization for compensation. And yet, unless counsel is appointed and effectively serves, there can be no successful prosecution.[112] The teaching of *Gideon* and its progeny is clear: the presence of defense counsel is a necessary ingredient in the total prosecution formula.

The increasing demands for uncompensated service inevitably led to litigation seeking payment under the general authority for the provisions requiring the county to bear the costs of criminal prosecutions. These cases were grounded on the theory that since defense counsel is necessary to a successful prosecution, the cost of compensation is a vital part of the "expenses" of the trial.

The first case to recognize and apply this principle was *State v. Rush*,[113] wherein counsel was appointed to represent an indigent charged with a non-capital felony. The New Jersey statute[114] authorized compensation only in murder cases, and counsel's application for allowances and reimbursement was accordingly denied by the trial court.[115]

On appeal to the state supreme court, counsel offered an interesting array of theories upon any one of which the right to compensation could arguably be based. He first urged that the constitutional right of the client to effective counsel is denied because unpaid counsel performs less zealously than compensated counsel and because most assignments are given to young, inexperienced attorneys. The court rejected both of these arguments and turned to a consideration of the constitutional claims advanced by counsel in his own behalf. Included were arguments that assignment without pay constitutes a taking of private property without due process of law, denies equal protection of the law, and constitutes involuntary servitude. Citing *Dillon*, the court found these claims to be without merit.[116]

The court then turned to what it considered the important policy issue in the case: "whether the members of the bar should continue to

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[108] Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).

[109] In Re Gault, 387 U.S. 1 (1967).

[110] Coleman v. Alabama, 399 U.S. 1 (1970). *But see* Pointer v. Texas, 380 U.S. 400 (1965).

[111] Mempa v. Rhay, 389 U.S. 128 (1967).

[112] *See* cases cited notes 108-111 *supra*.

[113] 46 N.J. 399, 217 A.2d 441 (1966).

[114] N.J. STAT. ANN. § 2A: 163-1 (1951).

[115] 46 N.J. 399, 217 A.2d 441, 442 (1966).

[116] 217 A.2d at 445.

bear alone the constitutional duty of the State to provide counsel for the indigent."[117] In approaching this issue, the Court was concerned with three questions: (1) whether the judiciary has the power to order relief, (2) assuming it does, whether the relief should be granted, and (3) whether authority presently existed for payment by the county where the prosecution was instituted.[118]

The New Jersey court quickly found that it possessed the inherent power to award compensation in the absence of statutory authorization. This power was inherent in the judiciary, the court concluded, because the "duty to defend the indigent without charge is not a personal duty in the conventional sense of an obligation owed by one man to another . . . Rather the duty is owed to the Court. . . ."[119] Owning the power to control the practice of law before it, the New Jersey court concluded that it also possessed the power to order compensation for those court officers whose performance is necessary for the functioning of the system.

Answering the second question, the court decided that relief, in the form of compensation, should be ordered:

> Although . . . the assignment of counsel without compensation (except in murder cases) has been the rule in this State since 1795, the burden of those assignments has increased vastly. The increase has been not only in the number of assignments, but also in the demand a criminal case makes upon counsel. A criminal case used to be a fairly simple affair. Today, with rapidly changing concepts relating to . . . confessions, search and seizure, etc., the defense of criminal charges consumes far more time. . . . To this must be added the impact of the right of the indigent . . . to appeal, and to press post-conviction proceedings . . . in the federal courts. We are satisfied the burden is more than the profession alone should shoulder, hence we are compelled to relieve the profession of it.[120]

Finally, the court concluded that authority for the payment could be found in the statute requiring the county treasurer to pay "All necessary expenses incurred by the prosecutor . . . in the detection, arrest, indictment and conviction of offenders. . . ."[121] "Thus," the court continued, "the 'necessary expenses' of the prosecution are the burden of the county. Within that category must fall the expense of providing counsel for an indigent accused, without which a prosecution would halt and inevitably fail under *Gideon* . . . ."[122]

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[117] 217 A.2d at 446.

[118] *Id.*

[119] 217 A.2d at 447.

[120] 217 A.2d at 448.

[121] N.J. STAT. ANN. § 2A: 158-7 (1951).

[122] 217 A.2d at 449.

The reasoning of the *Rush* decision was adopted by the Massachusetts court two years later in *Abodeely v. County of Worcester.*[123] There being no specific statute authorizing payment to appointed counsel, the court found that such authority existed in the general statutes requiring the counties to bear the costs of criminal prosecutions. Stating that it was not unmindful of the traditional theory that the obligation to serve indigents accompanies the license to practice law, the court added:

> But times have changed . . . the all purpose attorney . . . is no longer with us. Literally thousands of our lawyers . . . never see the inside of a court room . . . . Not only has the bar itself been divided into specialities but [a] very small percentage . . . has developed skills in the practice of criminal prosecution and defense. It is unjust that this comparative handful of individuals should alone bear the burdens which are rightly those of all of the bar and indeed of the community and the taxpayers.[124]

V. Invoking the Rush Principle in Mississippi

Although few Mississippi lawyers have had the temerity to consider litigating the established principles of representation without compensation, the unjust fee schedules provided in section 2505 have produced widespread discontent.[125] This unease derives from at least four basic inequities in the section: (1) the fees provided for felony representation are unrealistically low; (2) there is no provision for compensation for representing an indigent misdemeanant; (3) no compensation is provided for representation in juvenile or post-conviction matters; and (4) no payment can be obtained for representing an accused felon prior to indictment.[126]

The unfairness of these omissions is graphically illustrated in the recent case of *Board of Supervisors v. Bailey.*[127] Honorable W. T. Bailey, an attorney in George County, was appointed to represent two indigents who had been arrested and charged with the crime of rape. Mr. Bailey investigated the case and prepared his defense. At the preliminary hearing, he was successful in obtaining a dismissal of the charges, and no indictment was ever returned. About the same time the circuit court also appointed Mr. Bailey to defend three indigents charged with misde-

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[123] 352 Mass. 719, 227 N.E.2d 486 (1967).

[124] 227 N.E.2d at 489.

[125] The results of the 1966 study indicated that thirty-nine percent of responding bar members felt that the fee allowance constituted a "serious hardship" on the attorney. Fifty-four percent thought that the fee allowance was a "hardship but not a serious one." Williams, *supra* note 4, at 270.

[126] Miss. Code Ann. § 2505 (1956).

[127] 236 So. 2d 420 (Miss. 1970).

meanors in the justice of the peace court. Subsequently, the court allowed Bailey fees of $150 in each of the rape cases and $50 in each of the misdemeanors, but the board of supervisors, finding that it was not authorized to make such payment, disallowed the claim. Bailey appealed to the circuit court where the board's order was reversed, and payment of the claim was ordered. On appeal to the Mississippi Supreme Court, the board argued that, in the absence of a specific statutory provision, it lacked authority to pay the claim, even though ordered to do so by the circuit court.[128]

The phrasing of Bailey's position on appeal reflected a careful study of the various efforts to obtain adequate compensation through litigation. Recognizing the futility of arguing the "taking of property" theory already laid to rest by *Dillon*, a decision was made to base the entire argument on the proposition that sufficient general authority for compensation already existed in the language of section 261 of the Mississippi Constitution.[129] This provision, constitutional in nature, appears to be stronger general authority than the statutes relied upon in *Rush* and *Abodeely*.

Consequently, Bailey's argument was grounded completely on section 261 and developed the following principles: that under the Sixth Amendment as construed in *Gideon*,[130] *Miranda*,[131] *Harvey*,[132] and *White*,[133] the pre-indictment appointment of an attorney for an indigent charged with a felony, or with a misdemeanor providing confinement as a punishment, is essential to the effective administration of the criminal process; that the frequency of such appointments and the consequent burden on the bar renders necessary the payment of adequate compensation; and that such compensation now constitutes an integral part of the "expenses of criminal prosecutions" which section 261 requires the counties to bear.[134]

The only Mississippi case urged by the attorney general as possessing some relevance was *Dismukes v. Board of Supervisors*,[135] wherein attorney Dismukes was appointed to defend certain paupers indicted for murder. After the termination of the cases, he presented his account for $400 to the board of supervisors. The board disallowed the claim, and Dismukes instituted suit against it. A demurrer was sustained, and,

[128] *Id.* at 421.
[129] *Id.* at 422.
[130] Gideon v. Wainwright, 372 U.S. 335 (1963).
[131] Miranda v. Arizona, 384 U.S. 436 (1966).
[132] Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).
[133] Coleman v. Alabama, 399 U.S. 1 (1970); White v. Maryland, 373 U.S. 59 (1963).
[134] Board of Supervisors v. Bailey, 236 So. 2d at 422.
[135] 58 Miss. 612 (1881).

on appeal, Dismukes grounded his argument on the theory that he was entitled to "reasonable compensation for his labor and services rendered,"[136] citing the Indiana case of *Webb v. Baird*.[137] In a cursory opinion the Mississippi Supreme Court held:

> The Board of Supervisors could not lawfully allow such a demand. It is prohibited from appropriating the money that may come into the treasury of the county to any object not authorized by law, and there is no law authorizing an appropriation to this object.[138]

Although seemingly helpful to a resolution of the issue, the *Dismukes* case is actually in no way controlling. The attorney fee sued for was not fixed and allowed by the circuit court, as was Bailey's fee; the case was decided prior to the adoption of the Constitution of 1890; and, most importantly, the decision was rendered long before the appointment of defense counsel for an indigent became a necessary and integral part of the prosecution of criminal cases.

In *Bailey* the Mississippi Supreme Court recognized that counsel must be appointed for indigents accused of felonies or serious misdemeanors, and further recognized that appointed counsel should be paid an adequate fee.[139] The court, however, was vexed with the problem of whether or not the courts possess the power to order payment from county funds of counsel fees such as were granted Bailey. Choosing to view this question as the paramount issue in the case, the court found guidance in Sections 1 and 2 of the Mississippi Constitution which divide the powers of state government into three divisions (legislative, judicial and executive) and which purport to enjoin each department from exercising the powers vested in either of the others:

> The authority to empower payment of attorneys . . . required . . . to defend indigents . . . is either a legislative matter or a judicial matter; it cannot be both. If the courts possess the power, then the legislature does not; or if the legislature does, the courts do not possess the power . . . . The appropriation of public funds is traditionally within the exclusive province of the legislature. While the judiciary possesses the inherent power to appoint counsel . . . it does not follow that the courts can order the expenditure of public funds to pay their fees.[140]

Finding that these constitutional provisions demanded that the courts maintain a "hands-off" policy relative to the allowance of attorney fees in the absence of statute, the court concluded:

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[136] *Id.* at 613.

[137] 6 Ind. 13 (1854).

[138] 58 Miss. at 613-14.

[139] 236 So. 2d at 421-22.

[140] *Id.* at 423.

> Sound policy and proper regard for the traditional notion that the matter is a legislative question should cause the courts to refrain from judicially engrafting an amendment to Section 2505.[141]

To the harried practitioner, struggling to maintain his economic equilibrium in times of spiraling inflation, the *Bailey* decision is discouraging and unsatisfactory. Efforts to obtain redress through legislative means have proved ineffectual; section 261 seemed to provide a plausible and legally defensible method of obtaining the financial assistance so sorely needed for the defense of indigents.

The renunciation of power by the court is especially discouraging, particularly in view of the fact that, despite its protestations, it has in the past exercised what could arguably be termed "legislative powers." For example, it might be assumed that the prescription of the rules of criminal procedure is a legislative power.[142] Yet, when demanded by the interests of justice and/or the efficient functioning of the judiciary, the court has not hesitated to promulgate rules of procedure for the inferior courts.[143] The existence of this power in the judiciary was recognized by Judge Inzer in an able and well reasoned dissent to the *Bailey* opinion:

> As a matter of public policy the circuit court is vested with inherent power to do any and all things necessary to the end that its processes may be accomplished and that the orderly administration of justice may proceed unfettered and unrestrained. This power includes the power to require the county to pay the necessary expense of accomplishing its purposes, whether there is a statute specifically authorizing such payments or not. If it was otherwise the legislature could, if it desired, make it impossible for the court to carry out its constitutional mandate.[144]

The real question in *Bailey*, according to Judge Inzer, was not the existence *vel non* of judicial power to authorize payment, but:

> [W]hether the providing of counsel for an indigent defendant has become an integral and necessary part of the expense of criminal prosecution. If it is, and no one seriously doubts the fact that it is, the circuit court is empowered by the Constitution to require the county to pay such expense.[145]

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[141] *Id.*

[142] *See, e.g.*, MISS. CODE ANN. §§ 2418-2611 (1956) (criminal procedure chapter).

[143] *See, e.g.*, Henry v. State, 253 Miss. 283, 174 So. 2d 348 (1965), wherein the court judicially enacted the procedure for moving to suppress evidence in advance of trial; In re Broome, 251 Miss. 25, 168 So. 2d 44 (1964), wherein the court formulated procedural rules for the exercise of state post-conviction remedies.

[144] Board of Supervisors v. Bailey, 236 So. 2d at 424.

[145] *Id.* at 425.

VI. Conclusion

It is recognized that certain of the propositions urged above, being argumentative in nature, are bound to provoke disagreement. All fair-minded readers will agree, however, that certain basic principles can be distilled from this amalgam of fact and rhetoric. These include at least the following:

(1) *Gideon* and its offspring currently require the appointment of counsel for indigents in felonies (even prior to indictment), serious misdemeanors, juvenile matters, and certain post-conviction matters.

(2) The increased incidence of appointments has created a material hardship on the bar.

(3) The provisions of section 2505 are woefully inadequate to compensate counsel for the time, skill, and training necessary to properly represent an indigent.

(4) The requirement of effective representation of counsel demands some provision for assistance in addition to counsel, i.e., investigative assistance, expert services, etc.

(5) The interests of fairness and justice, both to appointed counsel and indigent defendant, necessitate the payment of adequate compensation to counsel.

The *Phillips* and *Bailey* decisions indicate that there is little immediate prospect of relief through litigation in the Mississippi courts. Redress, as recognized by the Mississippi Judiciary Commission, must come through legislative action. Acceptance of this fact by the bar ought to produce a concerted effort to obtain enactment of legislation which will provide adequate compensation and reasonable expense funds.

The formulation of the Commission, contained in Appendix I, is a reasonable approach to a complex problem and apparently resolves most of the deficiencies in the present system. It is submitted that the best interests of the bar—and the taxpaying public—would be served by enactment of this proposal.

APPENDIX I

AN ACT TO AMEND SECTION 2505, MISSISSIPPI CODE OF 1942, RECOMPILED, AS AMENDED, TO PROVIDE COUNSEL FOR THE INDIGENT IN YOUTH AS WELL AS ADULT CASES; TO MORE ADEQUATELY COMPENSATE COURT APPOINTED COUNSEL FOR THE INDIGENT; TO LIMIT APPOINTMENTS TO A PANEL OF ATTORNEYS WHO AGREE TO PRACTICE CRIMINAL DEFENSE; TO CREATE THE OFFICE OF STATE

PUBLIC DEFENDER; TO PROVIDE FOR STAFFING, OFFICES AND EXPENSES; AND FOR RELATED PURPOSES.*

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 2505, Mississippi Code of 1942, Recompiled, as amended, is amended to read as follows:

2505. Any person indicted for a capital crime shall, if demanded by him by motion in writing before the completion of drawing of the special venire, have a copy of the indictment and list of the special venire summoned for his trial delivered to him or his counsel at least one (1) entire day before said trial.

SECTION 2. When any person shall be charged with a felony, misdemeanor punishable by confinement, or commission of an act of delinquency, the court or the judge in vacation, being satisfied that such person is an indigent person and is unable to employ counsel, may in the discretion of the court appoint counsel to defend him.

Such appointed counsel shall have free access to the accused who shall have process to compel the attendance of witnesses in his favor.

The accused shall be entitled to advice of such counsel before he is required to plead to any indictment or before any hearing in youth court.

SECTION 3. The senior circuit court judge in each circuit court district shall appoint a panel of lawyers from the district to act as public defenders. The attorneys on the panel shall be persons who have some interest and experience in criminal defense and who have agreed to serve when appointed. The panel shall represent indigent adults and minors in misdemeanor cases punishable by confinement, all felonies, and all delinquency cases. All judges faced with indigents in such cases shall draw from this panel for appointments of counsel. The list of such panel shall be filed in the office of the chancery clerk and of the circuit clerk in each county in the district and of the municipal clerk in each municipal in the district.

SECTION 4. Any member of the panel who is appointed to represent an indigent shall be paid Fifteen Dollars ($15.00) per hour for time spent in the representation of such indigent, plus actual expenses, all to be paid on allowance by the circuit judge from the county funds in the county of the offense. Such allowance shall be made on the basis of a sworn, itemized statement as to time and nature of work and the expense incurred by the appointed counsel.

Upon petition filed in the case and after hearing and order thereon, the circuit judge may also allow the employment of an investigator in any felony case with compensation to be fixed in the discretion of the trial judge but not to exceed Three Hundred Dollars ($300.00) for any such case.

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* This appendix is reprinted from the Report of the Mississippi Judiciary Commission to the 1970 Regular Session of the Legislature of the State of Mississippi.

SECTION 5. There is hereby created the position of State Public Defender. He shall possess the same qualifications as judges of the circuit and chancery courts and shall be appointed by the Mississippi Judiciary Commission. He shall be paid a salary not to exceed Fifteen Thousand Dollars ($15,000.00) per year. The term of the State Public Defender shall coincide with the term of the Governor.

SECTION 6. The State Public Defender, with the approval of the Mississippi Judiciary Commission, may appoint no more than two (2) assistants, each of whom must have the same qualifications as the State Public Defender who shall have the power to discharge any assistant so hired. Each assistant shall be paid a salary not to exceed Thirteen Thousand Five Hundred Dollars ($13,500) per year.

SECTION 7. The State Public Defender shall handle all appeals by indigents in the Supreme Court and all post-conviction remedies for indigents. He may keep brief banks and furnish other research assistance to court appointed lawyers at the trial level, but shall limit his actual participation to that above the initial trial stage of a case.

SECTION 8. The State Public Defender shall attend the Supreme Court, in person or by his assistant, and therein defend all criminal causes in which an indigent is the accused.

SECTION 9. Should the State Public Defender fail to attend, in person or by his assistant, any term of the Supreme Court, the court shall appoint some attorney to act for the indigent accused in place of the State Public Defender; and the person so appointed shall receive such compensation as the court may allow, not exceeding one-fourth (1/4) of the annual salary of the State Public Defender payable out of his salary; and on production of the order of the court making said allowance, the auditor shall issue his warrant on the treasurer for the amount, and shall charge the same to the account of the State Public Defender.

SECTION 10. The Capitol Commission shall furnish suitable quarters for the State Public Defender. The State shall pay the expenses of his office and the State Public Defender may hire such clerical staff as he needs within the limitations of his appropriation.

SECTION 11. The State Public Defender's office shall be open on each business day with the same hours as other State employees.

SECTION 12. In addition to the keeping of the general docket as hereinabove required, the State Public Defender shall keep in his office a comprehensive set of books showing all receipts and disbursement of funds received by the office from whatever source, including appropriations by the Legislature, the contingent fund and other funds; and he shall, not later than the first week of each regular session, file a complete report with the Legislature of all moneys received and disbursed by him during the fiscal year.

The State Public Defender shall deposit all funds received by his office in a state depository, in his name as State Public Defender of the State of Mississippi, and shall not commingle or mix any funds received by him in his official capacity with his personal funds, or other funds,

and shall make disbursement and distribution thereof within the time and in the manner required by law of State offices.

SECTION 13. The State Public Defender shall make reports at the beginning of each regular session of the Legislature of the condition of the public service as administered by his office and under his supervision; and he shall, as a part of his reports, make any recommendation that he may deem proper for the improvement of the service.

SECTION 14. This act shall take effect and be in force from and after July 1, 1970.

JUVENILE OFFENSES: A STUDY OF ADJUDICATION AND DISPOSITION IN MISSISSIPPI*

*Bill Joyner** and John Maxey****

I. Introduction

When a youthful offender is brought before today's youth court, a complex chemistry is established: society charges that its rules have been breached and retribution is required; the court is told to take actions which will serve the welfare of the child; the judge must both apply elements of the criminal court, and serve temporarily as that child's parent with attendant affection. The person representing either the petitioner or society must now shoulder the highest burden of demonstrating to the court the proof of a breach—proof that the child before the court is the cause of that misdeed and, now, proof that the child is too young to be treated as a criminal.

The attorney representing the juvenile is under oath to pursue his client's cause with zeal warm enough to find exoneration, but he must himself also judge whether or not that achievement would best serve his client.

From this cauldron of ironies arose the inspiration for this project.

As originally conceived, the institute would take the youth court system as it is in Mississippi today, analyze it, and digest the analysis into reportable form. The means to this end were of traditional design: interviews with principals involved; such as judges, rehabilitation officials, law enforcement officers, attorneys, and juvenile delinquents; statistical compilations; library research; and on-site inspections of physical facilities. Upon completion of that process, the institute would reach its conclusions which would, by their nature, contain self-identifying solutions.

There was a fatal infirmity in the basic hypothesis—the youth court system is not a system at all. It was discovered to be not a series of re-

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lated steps toward a preconceived objective, but a muddle of competing and often contradicting activities. The abstractions, necessary and desirable essentials, are constantly changing not only in form, but also in character. For example, a youth court judge in disposing of a case in which a child is charged with a minor sex offense, must release him because the petitioner could not sustain his burden of proof. The child, however, may need rehabilitation so as to avoid future criminal acts. On the one hand, the judge must look to the welfare of the child; yet he has no authority to perform that function until a judicial finding of delinquency beyond a reasonable doubt has been made.

The report, as originally conceived, could have more aptly been characterized as what the youth court system in Mississippi is not, rather than as what it is. The hypothesis then became that the youth court system is an artificial combination of illusions and realities.

This report, then, is a coordination of separate studies, an attempt to integrate the many facets of the youth court in the State of Mississippi.

II. The Juvenile Delinquent in Mississippi

To be subject to the jurisdiction of the youth courts of Mississippi, a person must have not yet reached his eighteenth birthday and be neglected, incorrigible, or delinquent.[1] There are a number of exceptions listed with reference to some specific acts.[2]

With the commitment to the philosophy that youth court affairs are to be kept confidential, the compilation of revealing statistics is limited. This factor adds to the inherent difficulty of measuring offenses committed against the state. "All such offenses do not become publicly recorded, which means that the recorded offenses are only a sample of those actually committed."[3]

In 1968 there were 6,560 children's cases disposed by the youth courts in Mississippi.[4] This constituted an increase from 1967 of some nineteen per cent.[5] About seventy per cent of those children referred in both 1967 and 1968 were referred to the courts for delinquency.[6] The remainder were in court upon facts alleging neglect.

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[1] Miss. Code Ann. § 7185-01 (Supp. 1968).

[2] Miss. Code Ann. § 7185-03 (Supp. 1968).

[3] J. Sellig & M. Wolfgang, The Management of Delinquency 2 (1964) [hereinafter cited as Sellig & Wolfgang].

[4] Miss. State Dep't of Public Welfare, Mississippi Youth Court Statistics 2 (1968).

[5] *Id.* at 21.

[6] *Id.* at 2.

Nearly seventy-five per cent of all children referred to the courts were boys, and boys comprised over eighty-three per cent of cases referred on delinquency.[7] Of the delinquent children referred, fifty-three per cent were Negro and forty-seven per cent were white.[8]

The average age of the delinquent was fifteen years, three months. Nineteen per cent of all children were under 10 years. We are told that a distinction is drawn at the age of ten—that those under ten are charged with neglect regardless of the offenses. However, ninety-six per cent of this age group had committed acts which would be considered criminal, except for their ages. Apparently some counties in the state are unaware of this distinction, systematically trying children in the justice of the peace court and sentencing them to the county penal farm.[9] Thirty-six per cent of all children referred were ten through fourteen years of age; forty-five per cent were fifteen to twenty years of age.[10]

The dominating reason for referral in delinquency was stealing.[11] It is assumed that this category included factual situations constituting the elements of burglary, grand and petty larceny, false pretense, etc.

The only available measure of psychological characteristics of delinquents comes from the training schools, Oakley and Columbia.

In 1956 William H. Holtzclaw, Jr., conducted a study of the cases of one hundred forty-seven boys committed to Oakley Training School.[12] This study revealed that while little relationship could be made between delinquency and both economic status and education of parents, a significant correlation was found between delinquency and the marital status of the child's parents.[13]

In early 1970, the Mississippi Institute for Youth Court Studies conducted surveys in the tenth grades of five high schools. Two schools were generally urban upper middle class, one was urban middle class, one was rural lower class (target school), and the other was urban lower class (also a target school). The unusual results were that the two upper middle class schools reflected a much greater exposure to youth courts

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[7] *Id.* at 5.

[8] *Id.*

[9] MISS. INST. FOR YOUTH COURT STUDIES, SURVEY OF COUNTY ATTORNEYS AND YOUTH COUNSELLORS (1969-70).

[10] MISS. STATE DEP'T OF PUBLIC WELFARE, MISSISSIPPI YOUTH COURT STATISTICS 6 (1968).

[11] *Id.* at 7.

[12] W. Holtzclaw, A Case Study of Boys Admitted to Oakley Training School from January 1956 to December 1956 (Unpublished thesis, Jackson State College, Jackson, Mississippi).

[13] *Id.* at 37.

than the lower class schools (over fifty per cent versus under fifteen per cent).[14] Several comments from youth court officials, as well as school people, students, and faculty, on these unexpected results indicated that drug use was the primary contributor to youth court activity with the upper middle class urban youths. Further, the figures in the target schools were high, rather than low. Over eighty-eight per cent of the children in Holtzclaw's study were from homes of less than two parents (where the information was obtainable).[15]

Of the children held in Columbia Training School during the period of July 1, 1967, through June 30, 1969, four hundred ninety were tested for intelligence quotient. The results were based on scores made on California, Otis-Lenon, Institute for Personality and Ability, Slosson Intelligence, and Slosson Drawing Coordination tests. The following results were obtained:[16]

I. Q. Score	Number Scoring
140 and up	0
120 to 139	6
110 to 119	38
90 to 109	157
80 to 89	87
70 to 79	93
50 to 69	97
20 to 49	12

The concentration of scores in the lower levels demonstrates, among other things, the commitment to a training school of those children needing specialized treatment for retardation. The superintendent of Columbia observed that the training school institution, as presently conceived, is not the proper place to incarcerate retarded children.[17]

III. Mississippi Youth Court Act: History and Philosophy

Toward the end of the twelfth century when the courts became structuralized in England, there began to be a separation of equity from law. The inflexible judicial writs were insufficient to serve the obvious ends of good conscience, which condition led the chancellors to rule in response to the proven needs of the parties, rather than issuing

[14] Miss. Inst. for Youth Court Studies, Survey of Five Mississippi High School Tenth Graders' Youth Court Attitudes (1969-70).

[15] W. Holtzclaw, *supra* note 12, at 29.

[16] Twenty-seventh Biennial Report of the Columbia Training School 8 (1969).

[17] Interview with Lloyd McGehee, Superintendent of Columbia Training School in Columbia, Mississippi, Nov. 28, 1969.

additional writs. In order to have some guide from which to seek answers, the chancellors went to sacred literature and to the Roman civil law.[18]

Since the equity courts had to both act on behalf of the king and provide extraordinary relief to the petitioners, a dilemma occurred when problems were presented by children. Ecclesiastical law gave no recognition to minors' capacity for self-determination; therefore, they had no standing in the courts of law. The interest of the sovereign, however, had to be protected. The solution came with the development of the doctrine of *parens patriae*. When a child's interest needed to be protected by the courts, the monarchy was said to stand in the place of the natural parents of the child and act in behalf of the child.[19]

While this concept formed the foundation for the treatment of juveniles with special attention, it was applied only for situations wherein the child had property rights in issue. Application was expanded to the person of the minor, as the chancery courts were created in the United States.[20] The youth court is often said to be the product of this evolution, *i.e.*, the wrongdoing juvenile is being protected from harming himself, rather than being punished for his misdeed.

Other sources are also given credit for being the origin of a separate juvenile court. One is that at common law the child was treated differently by the criminal courts, in that a child under seven was presumed incapable of committing a crime, and a child less than fourteen but older than seven had to be proven able to understand his acts before the criminal court would proceed.[21]

Another theory proposed that the creation of separate courts for juvenile offenders was coincidental with the humanitarian movements of the nineteenth century. These movements, in forcing government to respond in social terms, pressured for youth courts so that juveniles accused of illegal acts would receive rehabilitative treatment rather than punishment.[22]

It is significant that there is debate over the origin of youth court. Youth court statutes have been subjected to constitutional attacks, because the acts have frequently reduced the jurisdiction of courts of superior and original jurisdiction. The severe difference of views is

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[18] *See generally* V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE §§ 1-13 (2nd ed. 1950).

[19] 42 AM. JUR. 2d *Infants* § 22 (1969).

[20] *See* HERBERT, JUVENILE COURTS IN THE UNITED STATES (1927).

[21] TASK FORCE ON JUVENILE DELINQUENCY, REPORT TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, JUVENILE DELINQUENCY AND YOUTH CRIME 2 (1967).

[22] U.S. DEP'T OF H.E.W., CHILDREN'S BUREAU PUB. NO. 346, STANDARDS FOR SPECIALIZED COURTS DEALING WITH CHILDREN 55 (1954).

reflected in a dissenting opinion to a decision sustaining the constitutionality of Mississippi's youth court act:

> The Legislature, by the euphemism of denoting as a civil matter what, since Mount Sinai, has been regarded as a crime, has taken away the jurisdiction vested in the circuit court by the Constitution itself, and has rendered that court powerless to do anything about prosecutions of such persons.[23]

A differentiation of treatment of juvenile criminals was accomplished in New York. In 1825 the House of Refuge separated the juvenile from adult offenders and provided corrective assistance. The first reform school was established in Massachusetts in 1847.[24]

A distinctive treatment of the accused juvenile in the adjudicatory stages began evolving in the 1870's. Innovations such as separate trials, dockets, and provisions for the minor to have representatives present were introduced.[25]

The first juvenile court legislation was enacted by the legislature of Illinois in 1899. The court was given jurisdiction over all minors who were neglected, dependent, or delinquent.[26] Written into this new division of the judiciary were synthesized concepts, drawn from civil as well as criminal jurisprudence. The most significant addition, however, was the intentional inclusion of discretionary power in the youth court judge. At every stage of the court's treatment the judge had unbridled discretion, which has haunted the existence of the youth court.[27]

Mississippi followed the course set by Illinois in adopting the Youth Court Act of 1916.[28] Under that Act jurisdiction over the child accused of being destitute, delinquent, or abandoned, rested in both chancery and circuit courts. Jurisdiction over the person was obtained by summons issued in response to the filing of a verified petition charging the child with behavior or condition which the court was to consider for the purpose of determining whether the child be abandoned, delinquent, or incorrigible. The circuit court continued to extend original jurisdiction over crimes; but, in the case of juveniles accused of committing a crime, the circuit court was given the additional authority to refer the case to the chancery court for proceedings under the Act. Chancery court could refer to the circuit court the case of a juvenile accused of facts

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[23] Wheeler v. Shoemake, 213 Miss. 374, 420, 57 So. 2d 267, 289 (1952) (dissenting opinion).

[24] SELLIG & WOLFGANG, *supra* note 3.

[25] *Id.* at 3.

[26] TAPPAN, JUVENILE DELINQUENCY 163 *et. seq.* (1949).

[27] In re Gault, 387 U.S. 1 (1967).

[28] HEMINGWAY'S MISS. CODE §§ 5687-5721 (1927).

constituting a crime where the chancellor deemed it to be in best interests of the state.[29]

The 1916 Act was attacked with vigor in the landmark case, *Bryant v. Brown*.[30] The majority opinion gave juvenile courts language to defend its institution for many years thereafter.

A petition was filed in chancery court against a thirteen year old, Bryant, who was charged with committing acts constituting delinquency. Upon a finding of delinquency by the chancellor, Bryant was committed to the training school. The order was appealed on the grounds, *inter alia*, that the Act was unconstitutional in that it attempted to deprive a person of his liberty without due process of law, *i.e.*, without the right to a trial by a jury of his peers; that the Act was contrary to the statutory laws of the state as well as the Constitution; and that the petition was insufficient because it did not state with specificity the crime charged.

The court, in rejecting these contentions, said:

> It will be seen from an examination of the above cited sections [of the Act] that there are two schemes provided in the law for dealing with immoral, delinquent, or incorrigible children, or those who violate the law, either state or municipal, where such law involves moral turpitude, and instead of inflicting the punishment ordinarily inflicted for a violation of these statutes in proceeding under this statute, if the court proceeds to try the child in the circuit court under indictment for either misdemeanor or felony, the child has all the rights accorded to any other person violating the law, including jury trial and other incidents of criminal law. But if the court having jurisdiction of the misdemeanor or felony is of the opinion that the chancery court can better deal with the child, having regard to all the circumstances of the case, than the circuit court, the case may be transferred to the chancery court for proceedings under section 10 of the act. If the case is so transferred to the chancery court for hearing, it proceeds according to the procedure of the chancery court, and does not involve a prosecution for crime as such. In a case so transferred, the proceeding is changed from a criminal to a civil proceeding, and is governed by the rules of procedure in other civil cases. But in either event, the court may inquire into the facts and establish the fact by proof that the child has, in fact, violated the law of the state or of the municipality involving moral turpitude. The proceeding in the chancery court is not for the purpose of inflicting punishment or entertaining criminal jurisdiction. It is the remedial proceeding designed to reform and educate the child into the habits of industry, good morals, and conduct.[31]

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[29] *Id.* at § 5709.

[30] 151 Miss. 398, 118 So. 184 (1928).

[31] *Id.* at 413-14, 118 So. at 187-88.

The court then explored the legislature's power to pass such an act:

> As long as parents properly exercise their duty; under their natural rights, to rear, educate, and control their children, their right to do so may not be interfered with solely because some other person or some other institution might be deemed better suited for that purpose. . . . But where the parents fail to perform their natural duty to so rear and educate the child as to make it a useful, intelligent, and moral being, but permit it to go unrestrained and to become vicious in its habits and practices, and a menace to the rest of society, the state, as *parens patriae* of all children, may assert its power and apply the curative, so as to prevent injury to the child and to society by the negligent and wrongful conduct of the parents in failing to exercise the proper control and restraint over the child and its tendencies.[32]

The court said that the court of chancery acquired its power of *parens patriae* from section 159 of the state constitution.

In rejecting the contention that commitment to a training school was contrary to the thirteenth amendment to the United States Constitution, the court stated:

> The provisions of the Constitution, with reference to involuntary servitude, do not have reference to legitimate authority for the control and education of children. Children have, throughout the history of the country and during all the ages of law, been regarded as subjects of training and discipline within reasonable bounds. Under some of our statutes children, under certain conditions, can be apprenticed out, by the board of supervisors, for a term of years to prevent their becoming a public charge, and to learn . . . useful trades and occupations. It was never intended to interfere with this customary power, in the enactment of the Thirteenth Amendment and the similar provisions in the state Constitution prohibiting involuntary servitude, except as a punishment for crime. The child could be apprenticed at common law, and all the constitutional provisions are to be interpreted in the light of the common law and the legal history of the country.[33]

The dissenting opinion of Judge Anderson in *Bryant* contained arguments having a current sound:

> It cannot be said truthfully that the Industrial Training School in this state is not a penal institute. It is as much a penal institution as the modern, well-regulated, humanely managed penitentiary. . . . Under the statute the child is arrested and tried, and pending the trial he is in the custody of the

[32] *Id.* at 415-16, 118 So. at 188.

[33] *Id.* at 423-24, 118 So. at 191.

> sheriff, and is entitled to bail. On conviction he is committed to the institution—he is in prison, where he may be kept until he is twenty-one years of age. And, while so imprisoned, the statute makes it a criminal offense for any one to aid him in escaping from the institution. Under the statute correction in the form of corporal punishment may be administered if necessary. A child proceeded against under the statute is charged with crime. It is not a civil proceeding, but a criminal proceeding.[34]

This early attack on the youth court vividly demonstrates the conflict between concept and reality.

The second Youth Court Act was passed in 1940.[35] In effect this Act created a new court, since original jurisdiction over juveniles accused of being delinquent, dependent, or neglected was vested in the juvenile court department of the county, chancery, and circuit courts.[36] The Act prohibited the criminal prosecution of any child under fourteen;[37] and, in order to prosecute a child less than eighteen, an order to that effect had to be entered by the juvenile court.[38]

There were very few substantial changes in the 1940 Act from the act passed in 1916. Apparently, the legislature saw the need to strengthen the jurisdictional bulwarks protecting the juvenile court, and, while doing that, modified several of the procedural aspects.[39]

The 1940 Act was subjected to several tests; in each case the Act prevailed.[40]

In 1946 the Mississippi legislature enacted a new Youth Court Act[41] and repealed the Act of 1940. It is important to note the clarity with which the Act states the juvenile court proceedings to be civil: "No proceedings by the court shall be a criminal proceeding, but shall be entirely of a civil nature. . . ."[42] Trial by jury, as allowed by the 1940 Act, was expressly removed by § 7185-08 of the 1946 Act. Further, the exclusive and original jurisdiction under this Act was placed in the youth court divisions of the chancery or county courts.[43]

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[34] *Id.* at 433, 118 So. at 194.

[35] GEN. LAWS MISS. ch. 300 (1940).

[36] *Id.* § 3.

[37] *Id.* § 19.

[38] *Id.*

[39] *Compare* HEMINGWAY'S MISS. CODE § 5708 (1927) *with* MISS. GEN. LAWS ch. 300 (1940).

[40] *See* McGinnis v. State, 201 Miss. 239, 29 So. 2d 109 (1947); Lewis v. State, 201 Miss. 48, 28 So. 2d 122 (1946); Farr v. State, 199 Miss. 637, 25 So. 2d 186 (1946); Williams v. Bush, 199 Miss. 382, 24 So. 2d 863 (1946); Parker v. State, 194 Miss. 895, 13 So. 2d 620 (1943).

[41] MISS. CODE ANN. §§ 7185-01 to 7185-30 (1952).

[42] MISS. CODE ANN. § 7185-08 (1952).

[43] MISS. CODE ANN. § 7185-01 (1952).

In 1952 the 1946 Act was subjected to an attack at least as comprehensive as that in *Bryant v. Brown.*[44] As in *Bryant,* the court in *Wheeler v. Shoemake*[45] responded with a landmark defense of the youth court. The court said that: (1) the legislature was acting well within its constitutional police powers in determining the age at which a person becomes responsible under our criminal laws, and the Youth Court Act, in effect and in part, states that a person under 18 years of age is not criminally responsible unless the youth court first investigates fully and, after a judicial determination that the child's welfare and the public interest will be served better by a criminal prosecution, certifies the case to the circuit court; (2) appellant could not be charged for a crime in a criminal prosecution, but must be proceeded against in the youth court in a civil proceeding, not known at common law, and therefore, not within the restriction of § 156 of the Mississippi Constitution of 1890; (3) the legislature was acting within its constitutional police powers in placing exclusive original jurisdiction in a youth court division of chancery courts, for the additional reasons that this matter is one of "minor's business," of which chancery courts have full jurisdiction under Mississippi Constitution of 1890, § 154 (d); and (4) the preceding propositions were almost unanimously supported by the authorities and cases, both in Mississippi and elsewhere.[46]

The legislatures of 1964 and 1966 eroded the scope of jurisdiction of the 1946 Act. Both legislatures added exceptions to the jurisdictional section of the Act,[47] taking from the youth court jurisdiction over juveniles accused of any of a number of low level misdemeanors. These actions were unabashedly anti-civil rights motivated. For example: "[T]he House, in other actions Monday, approved 104-0 HB 960 which would by-pass youth courts in cases where juveniles take part in mass race demonstrations."[48] Other indications were:

> The Mississippi Legislature gave boost Monday to several segregation bills designed to control demonstrations expected this summer. . . . The House passed a measure taking youthful participants in demonstrations from under the jurisdiction of youth courts.[49]

There is speculation that these exceptions to the jurisdiction of youth courts raise serious issues of equal protection of the laws by creating unreasonable classifications and are thus vulnerable to attack

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[44] 151 Miss. 398, 118 So. 184 (1928).
[45] 213 Miss. 374, 57 So. 2d 267 (1952).
[46] *Id.* at 398-405, 57 So. 2d at 278-81.
[47] Miss. Code Ann. § 7185-03 (Supp. 1968).
[48] The Clarion-Ledger, May 26, 1964, at 12.
[49] *Id.*

in federal court.[50] The charge that the 1964 and 1966 amendments were contrary to the intent of the Act was raised in the Mississippi Supreme Court. The Court avoided the issue by finding that the exceptions were not applicable to that particular case.[51]

IV. The Expanding Meaning to the Juvenile Court of the Due Process Clause

The Mississippi Youth Court Act was little more than a decade old before its application was challenged on grounds that the constitutional imperatives of due process were omitted. The majority of the court wrestled with the elusive justifications: not punishment, but rehabilitation; reformation instead of imprisonment. Then the court wrote its opinion rejecting the application of due process but did issue a caveat that when "the child's offenses are considered for the purpose of administering punishment, that such proceeding is in the nature of a prosecution, conviction and punishment for crime, the child is entitled to the protection of all safeguards of the Constitution."[52]

The debate, then, was no longer over whether or not due process applied to juvenile proceedings, but over the degree of application. Litigation on the question had a decided eroding effect upon areas of discretion in youth court proceedings.[53]

The United States Supreme Court found in 1948 that coerced confessions were no more admissible against juveniles than against adults.[54] This ruling gave insight to the future of the Supreme Court's views on due process applications to juvenile proceedings. The logic began to develop, much like that noted in the *Bryant* dissent.

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[50] Interviews with youth court judges and referees, Miss. Inst. for Youth Court Studies, 1969, 1970. At least one attack has been made on the constitutionality of these exceptions; *see* Haywood v. Mickie, No. DC 7044-S (N.D. Miss. 1970).

[51] In re Green, 203 So. 2d 470 (Miss. 1967).

[52] Bryant v. Brown, 151 Miss. at 422, 118 So. at 190. The dissent in *Bryant* was a penetrating deflation of the artificial criteria:

> Even criminals cannot be convicted and imprisoned without due process of law without a regular trial, according to the course of the common law. In all criminal prosecutions against minors, for grave and heinous offenses, they have the right to demand the nature and cause of the accusation, and a speedy public trial by an impartial jury. All this must precede the final commitment to prison. Why should children, only guilty of misfortune, be deprived of liberty without "due process of law?" [*Id.* at 431-32, 118 So. at 193.]

[53] *See* Application of Johnson, 178 F. Supp. 155 (D.N.J. 1957); Wissenburg v. Bradley, 209 Iowa 813, 229 N.W. 205 (1930); Holden v. Smith, 135 Miss. 322, 100 So. 27 (1924); Dendy v. Wilson, 142 Tex. 460, 179 S.W. 2d 269 (1944).

[54] Haley v. Ohio, 332 U.S. 596 (1948). For a later similar statement, but in affirmative language as to the admissibility of juvenile confessions, see Gallegos v. Colorado, 370 U.S. 49, 87 A.L.R.2d 614 (1962).

In 1966 the Supreme Court stated that the hearing in juvenile court to waive the exclusive jurisdiction of the juvenile court and certify the juvenile to the adult criminal court must measure up to the essentials of due process and fair treatment.[55] The Court spoke to those "essentials of due process and fair treatment" by stating that as a condition precedent to binding over a juvenile from youth court to criminal court, the child must have counsel, must have a hearing, and there must be findings on which the youth court judge based his action. The Court failed to give further guidelines to the youth courts in defining what due process requirements were imposed at the juvenile hearing.[56]

The Court's decision in *In re Gault*[57] should not have been unexpected. To observers of the juvenile court movement, it was probably more surprising that a decision on procedural due process in juvenile courts had not been handed down long ago.[58] The Court held that the juvenile was entitled to: (1) complete and timely notice of the proceedings, (2) notification of his right to be represented by counsel, appointed by the court if he is unable to employ his own, (3) the privilege against self-incrimination, and (4) the right of confronting and cross-examining witnesses against him.[59]

The Court based its decision on much the same reasoning found in the *Bryant* dissent. Almost expressing surprise that there had not been earlier discovery of the often occurring misdirections of the youth courts, Mr. Justice Fortas in the majority opinion said: "Juvenile court history has *again* demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[60] The Court attempted to lay to rest the battle of the euphemism: "The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines."[61] The Court dwelled on the argument as if to absolutely dispel the need for further discussion about the dangers of contradicting the initial concepts of youth courts:

> A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited prac-

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[55] Kent v. United States, 383 U.S. 541 (1966).

[56] *Id.* at 549.

[57] 387 U.S. 1 (1967).

[58] Lefstein, *In re Gault, Juvenile Courts and Lawyers*, 53 A.B.A.J. 811 (1967).

[59] In re Gault, 387 U.S. 1 (1967).

[60] *Id.* at 18.

[61] *Id.* at 35 [Quoting from WHEELER & COTTRELL, JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL (1966)].

> tical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours. . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.[62]

Regardless of the intensity of attack on misdirection of the youth court in *Gault*, there was great emphasis on disclaiming any criticism of the youth court concept:

> While due process requirements will, in some instances introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite, nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child.[63]

The implication left by the majority in *Gault* is that the major distinction in the treatment of the adult criminal and the delinquent child is found in the dispositional rather than in the adjudicational stage. There is the willingness to sacrifice the "informality" or "discretion" when the juvenile's rights are endangered. Of course there can be no other rational conclusion once the decision is made that due process requirements are to be imposed on the youth court system.

Despite the progressives' somewhat adamant defense of the Court in *Gault*, the decision seems to be a perplexing paradox. On the one hand, the decision suggests that the child be treated tenderly, with the judge wearing his father-image robe; while, on the other hand, it demands that the judge treat the case as criminal in nature and insure the child's rights as an adult in every constitutional sense—an adversary-type hearing at the adjudicatory stage but informality and *parens patriae* at the dispositional stage. It is the feeling of many that this approach is unrealistic and impractical.[64]

Once a decision with the impact of *Gault* is handed down, there is always a search for the limits of the decision. This case proved to be no exception.

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[62] *Id.* at 27.

[63] *Id.*

[64] MISS. INST. FOR YOUTH COURT STUDIES, *supra* note 9.

Probable cause must be present for a juvenile to be taken into custody and detained in the juvenile detention center.[65] The exclusionary rules of evidence have to be applied to juvenile proceedings.[66] Counsel has to be available to juveniles in order for admissions at arraignment to be admissible against the juvenile in delinquency proceedings.[67] The right to counsel for juvenile defendants contains the inherent requirement that counsel provide effective assistance.[68] Unless the juvenile has been specifically advised as to his right to counsel, he cannot intelligently know whether to waive that right.[69] Counsel must be provided at every critical stage of the juvenile proceedings.[70]

If the certification hearing of a delinquent had been held more than one year prior to the *Gault* decision, the delinquent was not entitled in a suit seeking post-conviction relief to receive the benefits conferred in *Gault*.[71] Right to counsel as set forth in *Gault* would be applied retroactively in a proceeding for an application in the nature of a writ of error coram nobis.[72]

In late 1969 another major assault was made upon an area of discretion remaining with the youth court judge. A minor before the youth court in Nebraska had demanded a jury trial for his delinquency hearing. Four of the seven Nebraska Supreme Court judges thought that this was a right to be afforded juveniles, but a provision in the Nebraska constitution required that five of the judges had to concur for the case to be reversed.[73] An appeal was taken to the United States Supreme Court.[74]

The appeal was dismissed on grounds that the right to a jury trial in criminal causes had been defined only after the hearing in the *DeBacker* case and that those decisions were to receive only prospective application.[75] The question raised, the answer to which would likely have greater impact than the jury issue, was the burden of proof resting on the state to establish delinquency. The Supreme

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[65] Baldwin v. Lewis, 300 F. Supp. 1220 (D. Wis. 1969).
[66] In re Marsh, 40 Ill. 2d 53, 237 N.E. 529 (1968).
[67] In re Richard W., 29 A.D.2d 873, 288 N.Y.S.2d 380 (1968).
[68] Love v. State, 221 So. 2d 92 (Miss. 1969).
[69] Phillips v. Cole, 298 F. Supp. 1049 (D.N.D. 1968).
[70] Freeman v. Wilcox, 119 Ga. App. 325, 167 S.E.2d 163 (1969).
[71] Powell v. Sheriff, 462 P.2d 756 (Nev. Sup. Ct. 1969).
[72] Roy M. v. People, 33 A.D.2d 232, 306 N.Y.S.2d 716 (1970).
[73] DeBacker v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968).
[74] DeBacker v. Brainard, 396 U.S. 28 (1969).
[75] *Id.* at 30.

Court found that "this case is not an appropriate vehicle for consideration of the standard of proof in juvenile proceedings."[76]

The appropriate vehicle for deciding the burden of proof issue came in the case of *In Re Winship*.[77] Justice Brennan, writing for the majority, stated: "In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*. . . ."[78]

The dissent by Mr. Chief Justice Burger, who was joined by Justice Stewart, scorned the majority with the searing criticism: "The Court's opinion today rests entirely on the assumption that all juvenile proceedings are 'criminal prosecutions,' hence subject to constitutional limitations."[79] The majority responded by saying that this due process requirement did not apply to the prejudical or informal proceedings, nor to the dispositional stages, but only to the hearing where delinquency is charged on facts which would constitute a crime if committed by an adult.[80]

The realities of the youth court concept are becoming less illusory with each term of the Supreme Court as the elements of fair treatment and due process are systematically being defined and applied to the juvenile court process. We are, however, beginning to feel the prick of the horns of another dilemma: when the illusions, euphemisms, and rhetoric are removed, are we going to have remaining a youth court resembling its conceptual prototype?

V. Initial Proceedings, Adjudication, and Disposition

When the youth court is informed that a minor is in a situation defined by the Mississippi Youth Court Act, it may decide to take jurisdiction. The court has the discretion to seek a preliminary social investigation, and, upon the finding therein, may make an informal adjustment for the best interest of the child or authorize a petition to be filed. No child can be committed to any institution except by hearing upon a petition.[81] The general criteria for deciding to handle a case informally are:

(1) That the case is such that the offense committed has not had serious impact on the community or the child.

[76] *Id.* at 31.
[77] 397 U.S. 358 (1970).
[78] *Id.* at 368.
[79] *Id.* at 375.
[80] *Id.* at 359, n.1.
[81] Miss. Code Ann. § 7185-05 (Supp. 1968).

(2) That the case is one in which the child and his parents cooperate in the disposition, which does not involve a change in legal status or rights.

(3) That the case appears to be one requiring a relatively short period of supervision or counselling, "Short Period" means three months or less without court review.[82]

The criteria generally applied calling for formal proceedings are:

(1) Cases in which it is necessary to make a factual determination on the question of delinquency or neglect or battering.

(2) Cases which are likely to involve a change in legal status or rights.

(3) Cases in which the parents or child indicates a desire to appear before the court.

(4) Cases in which there is a serious impact on the community or the child.

(5) Cases in which the parents refuse normal cooperation, or lack the ability to control the child.

(6) Cases in which the court must determine whether a child in custody or detention should remain so.

(7) Unless otherwise indicated by the social study and past record, cases in which two or more children are involved in the same delinquent act, and it has already been determined that one or more of them are to be handled formally.[83]

Of the 6,560 youth court cases disposed of in 1968 in Mississippi 2,076 were dealt with informally. This constituted about thirty-two percent, the other sixty-eight percent were disposed of formally, subsequent to the filing of a petition.[84]

The "arrest" of juveniles by law enforcement officials is often done in the same manner as the arrest of adults. It is at the booking stage, or when the formal charge is filed, that the person's age is established so that, if under eighteen, the person is certified to the youth court. At this point the youth court judge is notified, and he decides upon the procedure for release, pending the initial investigation. The very

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[82] MISS. STATE DEP'T OF PUBLIC WELFARE, JUDGES' ADVISORY COMM. & CHILD WELFARE DIV., HANDBOOK OF MISSISSIPPI YOUTH COURT SERVICES 5002 (1965).

[83] *Id.* at 5001.

[84] MISSISSIPPI YOUTH COURT STATISTICS, *supra* note 4, at 4.

strong intent is declared by the Act: "[N]o child shall be detained unless, in the opinion of the judge, it shall be necessary to insure protection of the child, or necessary for the protection of other children, or to insure his attendance in court at such time as it shall be required."[85] The section goes on to state what steps should be taken in order to avoid detention. The Act provides for the incarceration of a child "whose habits or conduct are deemed such as to constitute a menace to other persons."[86] Though there is no mention of bail in the Act, nearly thirty percent of accused youth offenders are required to post an appearance bond.[87]

Should incarceration be necessary, the Act prohibits the placing of the children in a room or ward with adults. Yet about forty per cent of the counties in Mississippi have juveniles and adults confined together at some time.[88] While most youth court officials agree with the intent of the Act, the frequency with which this proviso is broken seems to be a function of the absence of separate detention centers. A very small minority of officials felt that the Act left to the discretion of the judge the decision to house juveniles and adults together and that it was probably not unhealthy to do so.[89]

The judge of the youth court in Mississippi will be the chancellor, county court judge, or youth court referee. At present there are only sixteen county courts (therefore youth court judges) including the family court in Harrison County, which serves as youth court for that county.[90] In the counties where there is no county court, the chancellor is ex officio youth court judge, but can delegate to a referee the special duties constituting a youth court judge's function.[91] All orders from this referee are subject to the approval of the youth court judge.

The role of the instigator, prosecutor, or litigator is carried out most often by one of three persons, the youth counsellor, the district attorney, or the county attorney. The youth counsellor is a qualified person appointed by the youth court judge and paid by the board of supervisors of that county.[92] The qualifications of a counsellor are that he be graduated from an accredited 4 year college or have been in the practice of law for 10 years or more, have a knowledge of the

[85] MISS. CODE ANN. § 7185-06 (Supp. 1968).

[86] *Id.*

[87] MISS. INST. FOR YOUTH COURT STUDIES, *supra* note 9.

[88] *Id.*

[89] Interviews with youth court judges and youth court referees, *supra* note 50.

[90] MISS. JUDICIARY COMM., REPORT TO THE 1970 REGULAR SESSION OF THE LEGISLATURE OF THE STATE OF MISSISSIPPI 50 (1970).

[91] MISS. CODE ANN. § 7185-14 (Supp. 1968).

[92] MISS. CODE ANN. § 7185-21 (1952).

Youth Court Act, and have the ability to deal with the public with good judgment.

As a practical matter, district attorneys rarely assume any role in the youth court system. The identification of this duty is difficult in that the person must sometimes prosecute and at other times serve as counsellor-confidant of a wayward child. Too often the county or district attorneys prosecute.[93] In jurisdictions where counsellors are utilized, there is less tendency to have a prosecution and a greater tendency to simply have a presentation. The feeling is that where there is a failure on the part of the counsellor to adequately present the case for the prosecution, the youth court judge can cure it by certifying the child to the action of the grand jury.[94]

In many counties the county prosecuting attorney serves as counsellor prior to trial and as probation officer after adjudication of delinquency. The child takes the county attorney into his confidence, revealing his innermost secrets, only to find at a later date that his friend is using that information to prosecute.[95]

The defense attorney is very much a part of the youth court scheme, especially after the *Kent* and *Gault* decisions. Many juvenile court judges in this state feel that it is safer for them to see that defense counsel is present, either privately engaged or court appointed.[96] This is an attitude reflecting the mercurial state of the law with respect to waiver of rights by juveniles.[97] The youth court is faced with the annoying problem of appointing counsel to serve without compensation, because no statutory provisions for payment of appointed counsel to youth court have been adopted by the Mississippi legislature. In one chancery district the chancellor has gone to the board of supervisors in each county of his district to ask them to compensate attorneys appointed by him to represent the indigent juvenile accused.[98] In another area the records are kept of services performed by attorneys in youth court so that compensation can be made when the legislature passes the proper legislation.[99] The fact remains, however, that in nearly seventy-five percent of the jurisdictions, there is no provision for compensation of appointive counsel in youth court.[100]

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[93] Interviews with youth court judges and youth court referees, *supra* note 50.

[94] *Id.*

[95] MISS. INST. FOR YOUTH COURT STUDIES, *supra* note 9.

[96] Interviews with youth court judges and youth court referees, *supra* note 50.

[97] MISS. INST. FOR YOUTH COURT STUDIES, *supra* note 9. Seventy-seven percent of those responding stated that a juvenile could not waive his constitutional rights.

[98] Interviews with youth court judges and youth court referees, *supra* note 50.

[99] MISS. JUDICIARY COMM., *supra* note 90, at 31.

[100] MISS. INST. FOR YOUTH COURT STUDIES, *supra* note 9.

The role of the defense counsel is as difficult to delineate as that of the counsellor or prosecutor. He must protect the ill defined rights of his client, while attempting to guide the proceedings in a direction which will best serve his client's welfare. By being technical and bringing into play all of the skills available to the defense counsel, he may make the proceedings adversary and cause a child in need of special attention to be returned to the very conditions that bred his errant behavior. Then again he may be informal, cooperate with the youth court officials, and not rely on his own investigation, and cause his client to be committed unnecessarily to a reformatory. The Handbook of Mississippi Youth Court Services states:

> He [defense attorney] should as in other courts stand as the ardent defender of the constitutional and legal rights of his client. He should bring with him to this task the usual tools of his profession, familiarity with the applicable law, the ability to make a thorough investigation and logical presentation of the pertinent facts and the faculty for forceful presentation of his client's position. He should also submit plans or suggestions for the solution of the problem. Attorneys will often be in accord with the suggestions of the youth counsellor or other court personnel after the facts upon which they are based are made known to them. In such situations, attorneys may be of great help in securing the acceptance by the child or family of the proposed plan.[101]

The hearing on a formal petition is held upon no less than three days service of process on the accused delinquent and the parent, guardian, or custodian of the child. Waiver can be recognized when the child and parent, guardian, or custodian are in court and do not object to irregularities or process.[102] Failure to follow this provision deprives the youth court of jurisdiction.[103] The hearing is to be held only in the presence of interested persons and without a jury.[104] The informality of the hearing is preserved by § 7185-08 of the Mississippi Code, which waives the rules of evidence and technicalities of the hearing.[105]

There is a significant difference of opinion on what burden of proof falls upon the state or petitioner. For example, a sampling of county attorneys and youth counsellors revealed that thirty per cent thought the burden was "beyond a reasonable doubt," thirty-three per cent thought it to be "clear and convincing," while seven per cent

[101] HANDBOOK OF MISS. YOUTH COURT SERVICES, *supra* note 82, at 3005-06.

[102] MISS. CODE ANN. § 7185-06 (Supp. 1968).

[103] Sharp v. State, 240 Miss. 629, 127 So. 2d 865 (1961).

[104] MISS. CODE ANN. § 7185-08 (1952). A similar jury provision was attacked unsuccessfully in Bryant v. Brown, 151 Miss 398, 118 So. 184 (1928).

[105] *See* In Re Simpson, 199 So. 2d 833 (Miss. 1967).

thought the burden to be by a "preponderance of the evidence," and the remainder failed to respond.[106] One youth court judge said he applied the "reasonable doubt" test to commit to the training school, "clear and convincing" to bind over to the grand jury, and the "preponderance" test for a finding of delinquency with a first offender likely to get only probation.[107]

The United States Supreme Court, in *In re Winship*, eliminated doubt as to the burden of proof necessary to be met before a child is sent to a training school.[108] If construed narrowly, however, *Winship* would only apply to training school cases and not to probation, change of custody, or other means of disposition available to a youth court judge.

Upon a finding by the youth court judge that the child is neglected, delinquent or battered, the court has the discretion to:

(1) Change the custody of the child;

(2) Dismiss the petition;

(3) Terminate its jurisdiction;

(4) Place the child under supervision in his own home or in the care of a relative;

(5) Place the child in a suitable family home or commit him to the custody of a suitable private institution or agency able and willing to receive him; or

(6) Commit the child to the custody of a state-supported training school.

In order for the youth court judge to be confident in the wisdom of his choice of disposition, he can order the local welfare department to do a social survey-report or a sort of presentencing study. The summary is confidential and is available to defense counsel only at the will of the court.[109] Recently another assistance has been provided the youth court. A pilot program has begun operation in Jackson to test the feasibility of using a full battery of diagnostic tests before disposition of the delinquent.

The Jackson County Juvenile Diagnostic Center is in part federally funded through the Division of Law Enforcement Assistance, Office of the Governor, and in cooperation with the Hinds County Youth Court.

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[106] MISS. INST. FOR YOUTH COURT STUDIES, *supra* note 9.

[107] Interviews with youth court judges and youth court referees, *supra* note 50.

[108] 397 U.S. 358 (1970).

[109] HANDBOOK OF MISS. YOUTH COURT SERVICES, *supra* note 82, at 6001.

This project has engaged the services of psychiatrists, psychologists, sociologists, medical doctors, and counsellors to spend approximately one week testing and examining the youth who has been adjudged delinquent. The Center integrates the results of the tests into a composite evaluation and makes recommendations. It is interesting that the project makes a practical recommendation, that is, one within available facilities, rather than a recommendation without consideration for available facilities. The recommendations serve only that function, but they are followed by the judges in most instances. The Diagnostic Center is limited to receiving only those children who have been adjudged delinquent. This is unfortunate. Perhaps it would be better to have children charged in youth court diagnosed prior to the adjudicatory stage, in order to better determine causative factors.

When the decision of the youth court is commitment to a state training school, the court transmits with the order of commitment a transcript of the proceedings, social investigation, and medical report.[110] If the child is female or under fifteen years of age, he or she is committed to Columbia Training School at Columbia, Mississippi. Male delinquents fifteen to eighteen years of age are committed to Oakley Training School at Raymond, Mississippi.[111]

Oakley was opened as the Negro Juvenile Reformatory in 1943 on a one thousand two hundred acre site. The capacity is about three hundred thirty, which is often strained. During the biennium of 1965-67, the average number of students was three hundred twenty.[112] There were major problems with securing personnel necessary for carrying out a rehabilitation program. For example, there were no social workers, no full time psychologist, no part time psychiatrist, physician, or dentist.[113]

The educational program at Oakley is one of academic and vocational training. Grades three through ten are taught along with remedial reading. The shop facilities are excellent, both in variety and quality.

Great emphasis appears to be placed on farming at Oakley. Some criticism has been voiced at the harm to the academic approach

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[110] MISS. CODE ANN. § 7185-11 (1952).

[111] Until recently Oakley was for Negro delinquents, and Columbia was for Caucasians. These institutions were integrated by court order in Montgomery v. Oakley, No. C.A. 4117 (S.D. Miss. 1969).

[112] THIRTEENTH BIENNIAL REPORT OF THE BD. OF TRUSTEES AND SUPT. OF THE OAKLEY TRAINING SCHOOL 14 (1967).

[113] *Id.* at 15.

because of the effort to make good crops.[114] This criticism could be justified when the role for rehabilitation is juxtaposed beside the utility of developing farming skills in this urbanizing society. The average stay at Oakley is about eleven months. The rate of recidivism of students returning to Oakley is eight to nine per cent (this does not include those who go on to other institutions).[115]

Columbia Training School, with a capacity for two hundred fifty children, had an average of two hundred forty-five during the past biennium.[116] The children are housed in cottages, each cottage having a study area and living quarters for the cottage parents. The school is modern and well equipped, and it offers a tenth grade education. Here, as at Oakley, there is much emphasis placed on the development of farming skills, but Columbia's farm of two thousand eight hundred acres is more modern and is better coordinated with vocational training facilities.[117]

The efforts at rehabilitation seem to be more purposeful at Oakley, especially noted with the use of the merit system at Columbia. This is a program of incentives with rewards leading to eventual release. The children are awarded merit points for approved behavior and lose points when they behave in an unacceptable manner. The length of stay at Columbia was reported to be about eleven months, as at Oakley.[118] The thirteen per cent rate of recidivism, while a bit higher than that at Oakley, remains a very low figure.[119]

The test of the training school is whether rehabilitation of the delinquents is accomplished. About sixty per cent of county attorneys and youth counsellors express doubt that rehabilitation of children sent there was adequate.[120] Most youth court judges only use the training school as the last resort in rehabilitation because of the feeling that the interest of the community is served more than that of the child when he is committed to a training school.[121] The superintendents themselves admit that rehabilitation suffers from a lack of resources.[122]

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[114] Confidential interview with former teachers at Oakley Training School, Nov. 6, 1969.

[115] Interview with W. L. Eiland, Supt. of Oakley Training School, Nov. 1969.

[116] TWENTY-SEVENTH BIENNIAL REPORT OF THE COLUMBIA TRAINING SCHOOL 22 (1969).

[117] Interview with Lloyd McGehee, Supt. of Columbia Training School, Nov. 28, 1969.

[118] TWENTY-SEVENTH BIENNIAL REPORT OF THE COLUMBIA TRAINING SCHOOL 22 (1969).

[119] Interview with Lloyd McGehee, Supt. of Columbia Training School, Nov. 28, 1969.

[120] MISS. INST. FOR YOUTH COURT STUDIES, *supra* note 9.

[121] Interviews with youth court judges and youth court referees, *supra* note 50.

[122] TWENTY-SEVENTH BIENNIAL REPORT OF THE COLUMBIA TRAINING SCHOOL 6 (1969); Interview with W. L. Eiland, Supt. of Oakley Training School, Nov. 1969.

VI. Conclusion

A. Summary

The Institute concluded that the juvenile delinquent in Mississippi is most often the product of a broken home. While some correlation would be expected between the impoverishment of the home and the occurrance of delinquency, this was not borne out by findings. There are no conclusive statistics showing how much deliquency is attributable to drug abuse, but it is suspected by the Institute to be a contributing factor to the increase of delinquency in upper-middle and upper class juveniles.

Stealing was the precipitating act most often leading to the commitment of children to the training schools. There were a number of indications that the acts of stealing by the juveniles were manifestations of neglect at home. This conclusion is based, in part, on interviews with members of the staff of both training schools, who all agreed that the children in the schools were generally anxious for attention and really not interested in committing illegal acts or being incorrigible. This leads to the conclusion that any effort at the elimination of juvenile delinquency will have to be based on both improvement and creation of family services programs.

It is apparent that too often children commit acts for which they are adjudicated delinquent and committed to a training school, when actually they are mentally retarded. This is a result which bears harm to the child and to the training school.

The Mississippi Youth Court Act in its present form is the legislative product of two previous Acts. The first was enacted in 1916 and did more toward defining treatment of juveniles than toward creating a new court. The 1940 Act, in effect, created a special court by vesting jurisdiction over juveniles accused of being delinquent, dependent, or neglected in the juvenile court department of the county, chancery, and circuit courts.

The present Act was passed in 1946. It removed the right to trial by jury which was included in the 1940 Act and stated that all proceedings in the youth court were to be considered civil. Jurisdiction was again modified by removing the youth court from the circuit court and vesting it solely in the chancery and county courts. The Act provided for a degree of procedural due process. The Act, for example, provided for use of counsel in a hearing but required that the expense be carried by the juvenile. This was extended by court decision to comply with due process requirements.

Amendments to the 1946 Act were passed in 1964 and 1966 which removed from the juvenile court jurisdiction over approximately twenty offenses. These amendments were admittedly passed in response to civil rights demonstrations participated in by juveniles.

The youth court acts of Mississippi have been subjected to a number of serious challenges. Time after time the youth court acts have been supported in constitutionality of both procedure and substance. On each attack of the constitutionality of the acts, it has been argued that any disposition carrying with it physical restraint in training schools deserves all protection offered criminals in criminal courts. This argument has been rejected by the Mississippi Supreme Court on the ground that juvenile court decisions are not criminal, but civil, and that the restraint is not punishment, but rehabilitation. The Mississippi Supreme Court has thus followed the view found in most courts across the state and the nation in their treatment of juvenile court systems.

In 1966, the first erosion of this approach was leveled by the United States Supreme Court. In 1967 the Court followed with the *Gault* decision which explicitly applied basic procedural due process to the juvenile court systems. With this door open, a number of challenges began to be filed in an attempt to delineate the extent of the *Gault* decision. The right to trial by jury was placed before the United States Supreme Court, but it was rejected without going to the merits of the issues raised.

Quite recently the question of the burden of proof falling upon the petitioner of the state in a juvenile proceeding in order to have a child adjudged delinquent and committed to a training school was raised in the Supreme Court. The Court responded again with similar reasoning as was found in the *Gault* decision by saying that the right of proof beyond a reasonable doubt must be applied to juvenile as well as to adult criminal proceedings in order to achieve due process and fair treatment. The Court did, however, say that it was concerned only with the adjudication stage, and not with the disposition of cases in juvenile court decisions. The confusion is that the latter decision has the effect of requiring a full re-examination of the juvenile court concept in its application in Mississippi, as well as in other jurisdictions. That is, can we still call the juvenile proceeding a civil action when, in fact, we have applied all of the criminal protection and procedures as defined by the United States Supreme Court? Many youth court judges, referees, counsellors, and members of the bar, who are commonly called as defense counsel in juvenile court cases, are suggesting that we must either completely revamp our youth court

system or do away with it, since we are not accomplishing the purpose originally conceived when the Act was passed.

The youth court judge can take either of two courses when a juvenile is ascertained to have committed an act or acts that constitute delinquency. He can take the informal route, or he can conduct formal proceedings. He cannot commit a child to a training school except by an adjudication in a formal proceeding. When a child is held informally before the juvenile court, he may be placed on probation or in his parents' care with an order to follow some sort of schedule.

When the juvenile court judge determines that formal proceedings are needed, a petition has to be filed setting out with specificity the acts the juvenile is accused of having committed. The accused has the right to counsel, transcript, confrontation and cross-examination of witnesses, and the right against self-incrimination. The petitioner must prove its case beyond a reasonable doubt.

In its disposition of the juvenile adjudged delinquent, the youth court may use probation in the custody of the child's parents or guardians, change the custody of the child, or commit the child to training schools. There are two training schools, one for girls and the other for boys fifteen and older.

The judge may utilize a recently introduced program of diagnosis prior to disposition. This program, located in Jackson, is a week-long series of tests by physicians, psychiatrists, psychologists, and sociologists to determine the needs of the delinquent and make recommendations. The judge is free to follow these recommendations or devise his own disposition.

The training schools, while having low rates of recidivism, do very little toward actual rehabilitation and training. More emphasis is placed on farm training than academics. There are indications that the training schools have been forced to house retarded children. This evidence leads to the conclusion that proper diagnostic tools have not been available to the judges prior to disposition.

There is a lack of uniformity of structure, application, and disposition in the youth court system. It is certainly important to keep the system flexible enough to be tailored to the individual child. It is also detrimental to the concept for a child to be subjected to possible long term incarceration without tools of defense made available by foreknowledge of what to expect.

B. Recommendations

1. Establish a special youth court for each chancery court district of the state.

Presently the chancellor is the youth court judge in many districts. In those counties with a county court, the judge of that court sits as youth court judge. In Harrison County the family court serves as youth court, and in Hinds County there is a special youth court. It is recommended that a youth court system be established as a separate entity from the above mentioned courts, but that the youth court venue be coincidental with the chancery court districts. The qualifications of youth court judges would be the same as for chancellors. Appeals would be taken directly from the youth court to the state supreme court, as is done in the chancery and circuit courts. Cases would be triable at any time, upon proper notice, without regard to court terms.

This recommendation seems both feasible and necessary in light of the increasing number of youth court cases, and in light of the chancery courts' increasing work load in other areas.

2. Extend the protection of the Youth Court Act to children from birth to the age of twenty-one.

This recommendation contemplates almost exclusive jurisdiction by the Youth Court of all children. Age twenty-one is arbitrary, but consonant with traditional concepts of defining minors. The circuit courts would have no original jurisdiction over children, no matter how serious the offense charged. Circuit court could obtain jurisdiction only after the child had been granted a hearing in youth court, and only after the youth court had determined that the child was beyond rehabilitation within its system. The chancery courts would still maintain jurisdiction in child custody and support matters, but could transfer these cases to the youth court, where proceedings would be identical to those in chancery.

3. Create a public defender system for indigent children charged with youth court offenses.

Presently, Mississippi has no public defender system but operates on a court appointive system for adult offenders. There is no provision in the Youth Court Act for compensating attorneys who represent children by youth court appointment. In most counties the youth court judge appoints a local attorney (more by way of request, than by appointment) who gives his time freely. As an interim measure, the Youth Court Act should be amended, authorizing the court to appoint attorneys with fees commensurate with those paid in the circuit courts. Here, as in circuit court, fees would be paid from county funds by the board of supervisors.

However, the Institute believes that this approach should be used only temporarily, and until such time as the legislature is prepared

to establish a state-wide public defender system. The public defender system would represent both adults and children, but one member of the staff would be designated as the youth court attorney. He would be free to act both as an advocate in the traditional sense and as a counsellor for the child.

4. Amend the Youth Court Act to remove § 7185-03 (1-20).

These provisions were enacted to chill "civil rights" involvement by children. From a constitutional perspective their validity is dubious. If a child is less than twenty-one years of age and is charged with certain felonies, the circuit court is required to take a hands-off position. However, a much younger child may be charged with a petty misdemeanor, i.e., disturbing the peace; the Youth Court may be precluded from intervening; and the child may be tried as an adult. This anomaly has often resulted in children being charged in both the youth court and the circuit or justice of the peace court at the same time.

5. Establish a permanent diagnostic center to serve the entire state.

There is presently established in Mississippi a state-wide diagnostic center. This project should be continued on a permanent basis with regional offices. This center should be permitted to diagnose children upon the filing of a petition in youth court and not required to wait until a finding of delinquency is made.

6. Authorize and require at least one youth counsellor for each youth court.

These individuals might be employed by the local county welfare departments, but they should be responsible primarily to the youth court. The Mississippi Welfare Department already has in its employ a number of qualified child welfare workers. The counsellors would not, as is present policy, submit their reports to the court until after the adjudicatory stage, or until a copy had first been provided the child's attorney.

7. Establish district rehabilitation centers to be used for counselling and a "half-way house" for those children returning from training school.

There are presently only two training schools for the entire state. Many of the children in those schools are from poor families. It is difficult, if not impossible, for most parents to visit their children during the period of incarceration. It is also, under the present system, difficult to gradually work children back into society.

It is suggested that district rehabilitation centers be established

so the child may become better equipped to return to his own neighborhood. Half-way houses should be established for continued supervision upon a child's release. Local organizations would be called upon for assistance. Both establishments should be directed by the state diagnostic center to avoid conflicts and duplication in treatment and approach. The local counsellor would work through the rehabilitation center, if the welfare department were unavailable.

The half-way house would be an out-patient service with responsibilities for counseling and guidance and would assume probation and parole work now carried out by local police.

Both district centers and local half-way houses would be staffed with professionally trained personnel.

8. Upgrade the Training Schools' staffs and revise the curricula.

Both training schools are suffering from limited budgets. However, it is the Institute's conclusion that the amount of rehabilitation provided by the two training schools is almost nonexistent. For all practical purposes neither school has any professional staff. Both emphasize farming—a rapidly fading occupation in this area. Continued emphasis should be placed on academics. A comprehensive effort should be made to train in skilled trades, i.e., automobile mechanics, television repair, etc. Mississippi has numerous junior colleges located all across the state which are already offering such courses. These colleges should initiate special, tuition free, instruction for delinquent children.

9. Create a commission to draft a Youth Court Procedure Act.

Mississippi's rules of practice and procedure have developed over the years without much revision or updating. This has been true for for both civil and criminal procedure. In this state, as in most other jurisdictions, there are rules and remedies peculiar to one field, but inapplicable to the other. For example, a motion for a bill of particulars is proper to gain insight into a pleading in a civil case, but cannot be used to clarify an indictment.

The Mississippi legislature has denoted its Youth Court Act as civil in nature, while the federal courts have left little doubt that these proceedings are criminal. The result has been confusion and often inadequate representation.

Since the youth court system is a hybrid of procedures, it should have its own system of rules. We recommend that a commission be created, consisting of youth court judges, legislators, practicing attorneys, and the Chief Justice of the Mississippi Supreme Court, to study

existing rules of practice and procedure and to recommend a uniform approach to be followed throughout the state.

10. Create a greater awareness of both problems and solutions among those involved in youth court work by providing a clearinghouse to dissiminate information.

The University of Mississippi School of Law and the University School of Business each have research foundations capable of collecting and distributing research and statistical data. Both carry on independent field and library research. These organizations could be called upon to establish a clearinghouse for youth court judges, public defenders, counsellors, and others interested in youth court problems. Youth court personnel would be kept up-to-date on the latest court decisions and on new approaches being attempted in other areas to stem the increased rate of delinquency.

STUDENT COMMENTS

STATE OR FEDERAL LAW IN FEDERAL COURTS: THE RISE AND FALL OF ERIE

I. Introduction

I fear great embarrassment and clashing between the Federal and State Courts.[1]

Federal diversity cases present inherent difficulties. Two sovereigns, state and federal, exercise powers within their respective spheres at the same time, over the same people, in the same territory. The greatest difficulty is represented by the question: which sovereign's law—state or federal—should apply in a diversity case? If state law is applied to every issue in diversity cases, federal decisions will be consistent with state court decisions at the expense of uniformity within the federal system. Conversely, to apply federal law to every diversity issue will produce consistent federal court rulings from state to state, with the possible effect of the federal court and the state court making opposite rulings within one state. A line of major decisions, beginning with *Swift v. Tyson*[2] and ending with *Hanna v. Plumer*,[3] reveals the Supreme Court's struggle with the problem.

The expressed goal of the Court in these cases had been uniformity. *Swift v. Tyson* purported to foster uniformity. *Erie v. Tompkins*[4] turned *Swift* upside down in the name of uniformity. *Guaranty Trust v. York*[5] expanded *Erie*; *Byrd v. Blue Ridge Rural Electric Cooperative*[6] and *Hanna* contracted *York*—all in the name of uniformity.

Although much sought after, uniformity remains elusive. The cases which should tell us when to apply state law in federal courts are unified only by their inconsistency.

To seek an answer to the posed question, it will be necessary to examine the historical background of this area of the law; to look at *Erie* and the four decisions which followed; to try to ferret from them the present state of the law; to examine the questions that remain unanswered; and, for the benefit of the Mississippi practitioner, to see how the Fifth Circuit Court of Appeals deals with these questions.

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[1] John Brown, Congressman from the Ky. Dist. of Virginia, 1789, as cited in Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 52 (1923).

[2] 41 U.S. (16 Pet.) 1 (1842).

[3] 380 U.S. 460 (1965).

[4] 304 U.S. 64 (1938).

[5] 326 U.S. 99 (1945).

[6] 356 U.S. 525 (1958).

II. Historical Background

In the beginning was the Word. . . .[7]

The word was the Rules of Decision Act, § 34 of the Judiciary Act of 1789.[8] The framers of the Constitution adopted this act; therefore, it has been accorded great reverence. Section 34 remains virtually unchanged[9] and is the basis for federal district court choice of law in diversity cases. It concisely stated the proper law to apply:

> That laws of the several states except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply.[10]

Until 1842, federal courts applied both state substantive law and procedural law. There were enough inconsistencies, however, to require the passage of the Conformity Act,[11] which dictated that state procedural law was to rule.

Justice Story sought to dispel any inconsistencies concerning the substantive law. In the 1842 New York case of *Swift v. Tyson*,[12] he was met with the question: Is a pre-existing debt good consideration for an endorsement of a bill of exchange? There was no applicable state statute, and the New York case law was not clear on the subject. Story was. Having written one of the two legal treatises in the fifty years of American jurisprudence, Story felt imminently qualified to speak. A pre-existing debt, he found, is valid consideration. There remained the problem of § 34 of the Judiciary Act: ". . . the law of the states . . . shall apply."[13] This statement required proper interpretation, and Story willingly obliged. He ruled:

> In the ordinary use of language, it will hardly be contended *that the decisions of courts constitute laws.* They are, at most, only evidence of what the laws are, and are not, of themselves, laws.[14] (emphasis added).

Swift was the law for the next ninety-six years. In diversity cases, federal judges followed state statutes, state rulings on purely local

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[7] John 1:1.

[8] 1 Stat. 92 (1789), Rev. Stat. 721 (1875). Now 28 U.S.C. § 1652 (1964).

[9] Now 28 U.S.C. § 1652 (1964), revised in 1948 to substitute "civil actions" for "trials at common law."

[10] 1 Stat. 92 (1789), Rev. Stat. § 722 (1875). Now 28 U.S.C. § 1652 (1964).

[11] 1 Stat. 275, *as amended*, (1792).

[12] 41 U.S. (16 Pet.) 1 (1842).

[13] 1 Stat. 92 (1789).

[14] 41 U.S. (16 Pet.) at 18.

matters and on real estate matters. If a case did not involve one of these three categories, the federal judge was free, regardless of state decisions, to reach the result he thought proper.

During the ninety-six year reign of *Swift*, the federal courts used federal general law instead of state law to decide tort questions and other questions in order to reach a "just result." Real estate matters alone were left unaffected.[15] The federal judiciary assumed full authority over the substantive law. Reaction set in;[16] criticism grew.[17]

At the same time, there was a need for procedural reform.[18] In response to this need, Congress passed the 1934 enabling act.[19] The United States Supreme Court complied with the act and wrote the Federal Rules of Civil Procedure. These rules were approved, to take effect in September, 1938. When the Federal Rules of Civil Procedure took effect, the state of the law, as expanded under *Swift*, was to be: federal rules govern procedure; federal general common law governs most substantive questions. State law would be used in purely local matters and little else.

III. Erie Through Hanna

On April 25, 1938, five months before the rules were to become effective, the celebrated *Erie Railroad Company v. Tompkins*[20] case came before Justice Brandeis, who had voted against the Federal Rules of Civil Procedure.[21] Tompkins had been walking along a path parallel to the Erie tracks when he was injured by something protruding from one of the cars on the passing train. His attorney argued *Swift v. Tyson*: under federal general law, Erie owed him a duty as a licensee. Erie

[15] Vandenbark v. Owens Ill. Glass Co., 311 U.S. 538 (1941). "During the period [1842-1938] when Swift v. Tyson ruled the decisions of the federal courts, its theory of their freedom in matters of general law from the authority of state courts pervaded opinions of this Court involving even state statutes or local law." [*Id.* at 540].

[16] Baltimore & O.R.R. v. Baugh, 149 U.S. 368 (1893), Justice Field, dissenting, expressed "an abiding faith that this, like other errors, will, in the end die among its worshipers." [*Id.* at 403.]

[17] The 1928 decision in Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928), applying Swift v. Tyson, was widely criticized and provoked a famous dissent from Justice Holmes, who was joined by Justices Brandeis and Stone. Holmes argued that the Swift v. Tyson rule was "an unconstitutional assumption of powers by the courts of the United States." [*Id.* at 533].

[18] *See* C. Wright, Law of Federal Courts § 62, 258-60 (1970).

[19] 28 U.S.C. 2072 (1964): "The Supreme Court shall have the power to prescribe by general rules . . . the practice and procedure of the district courts of the United States in civil actions. Such rules shall not abridge, enlarge or modify any substantive right . . . ."

[20] 304 U.S. 64 (1938).

[21] 3A W. Barron & A. Holtzoff, Federal Practice & Procedure 413 (Wright ed. 1961).

also argued *Swift v. Tyson*: under strong local real estate custom, Tompkins was a treaspasser; Erie owed him no duty. The Second Circuit Court of Appeals[22] upheld the lower court's judgment in favor of Tompkins by applying *Swift v. Tyson*. The general law gave Tompkins the status of licensee and imposed liability.

To the astonishment of parties, lawyers, and both lower courts,[23] Brandeis began his opinion: "The question for decision is whether the oft challenged doctrine of *Swift v. Tyson* shall now be disapproved."[24] He quickly answered his own question in the affirmative, and the Court entered the "eerie area of Erie."[25]

Justice Brandeis gave great weight to the research of Charles Warren,[26] who had found some "scraps" of paper in the Senate attic. These papers were the original draft of § 34 of the Judiciary Act of 1789. According to Warren's findings, the sole objective of diversity jurisdiction was to give the non-citizen an impartial forum, rather than to allow the federal court to administer its own law.

Warren discovered that the first draft of § 34 read:

> That the Statute law of the several states in force for the time being and their unwritten or common law are now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise, except where the constitution. . . .[27]

Warren maintained that the full phrasing was abandoned and "laws of the several states" substituted not to effect a change in meaning, but to express the same thought in fewer words. He stated repeatedly in his article that if Story had only had this valuable information, he could never have decided *Swift* as he did. The Court agreed, and added that the courts had construed the 1789 Act in an unconstitutional manner; the courts had invaded rights which the Constitution gave to the states.

Brandeis, in writing the opinion for the Court, addressed himself to the fact that *Swift v. Tyson* had not produced the hoped for uniformity, but had instead produced discrimination against state citizens in favor of non-citizens.

Erie's rule was simply stated by Brandeis:

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[22] 90 F.2d 603 (2d Cir. 1937).

[23] J. MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE § 0.03(45), at 316 (1949).

[24] Erie R.R. v. Tompkins, 304 U.S. at 69.

[25] Orenstein, *Erie Potpourri*, 38 CONN. B.J. 69, 90 (1940).

[26] Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923-24).

[27] *Id.* at 86.

> [T]he law to be applied . . . is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.[28]

Thus, taken together, *Erie* and the Federal Rules of Civil Procedure completely overturned the existing diversity law. Instead of following state procedural law and, in most cases, federal substantive law, the federal courts were now to follow federal procedural law and state substantive law.

In the "erieantompkinated"[29] days that followed, *Erie* was greatly expanded. *Guaranty Trust Company v. York*[30] overcame two hurdles. Unlike *Erie*, this was an equity case. Traditionally, federal courts had been free to decide equity matters without reference to state law.[31] The question was whether the action was barred in federal court because the statute of limitations barred action in state court.

Justice Frankfurter stepped over the equity hurdle and the substance-procedure hurdle with the word "immaterial." He pronounced diversity a fortuitous circumstance. "[T]he accident of a suit by a non-resident litigant in federal court instead of in state court a block away, should not lead to a substantially different result."[32]

The *York* test, then, was results. "[T]he outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."[33]

The apex of the combined *Erie-York* doctrine was reached in *Klaxon v. Stentor Electric*,[34] which put to rest any notion of a federal common law of conflicts. *Erie* and *York* had presented a conflict of laws problem; both decisions had ignored the problem. In *Klaxon* the Supreme Court reversed the circuit court's determination of the better view of the law and ruled that in diversity cases federal courts must apply the forum state's conflicts laws as well as the substantive law:

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[28] 304 U.S. at 78. On the same day, Brandeis wrote the opinion in Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938), in which he declared that federal common law would apply.

[29] Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 269 (1946).

[30] 326 U.S. 99 (1945).

[31] 28 U.S.C. § 1652 (1964), revised in 1948, made only slight changes in the old § 34, Rules of Decision. The phrase "civil actions" was substituted for "trials at common law" to leave no doubt that law and equity were merged.

[32] 326 U.S. at 109.

[33] *Id.*

[34] 313 U.S. 487 (1941).

"And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be."[35]

The first major inroad into the *Erie-York* doctrine was *Byrd v. Blue Ridge Rural Electric Cooperative.*[36] Byrd filed a negligence action for personal injuries against Blue Ridge, after receiving workmen's compensation from his contractor. Blue Ridge pleaded, as a complete defense, the fact that as a statutory employer, the workmen's compensation award protected him from further action by Byrd. Under the South Carolina law, the judge was to decide if Blue Ridge were a statutory employer. The district judge, applying state law, decided Blue Ridge was not; the court of appeals, also applying state law, held that Blue Ridge was a statutory employer. The Supreme Court applied federal policy and held that, in federal court, the jury must pass on the defense.

Justice Brennan spoke for the Court. If "outcome determinative" were the only consideration, a strong case could be made for the federal court applying the state rule, "[b]ut there are affirmative countervailing considerations at work here."[37] One such consideration was the seventh amendment. Justice Brennan found a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts, although he was careful to say that "the influence—if not the command—of the Seventh Amendment" required the use of the jury.[38] The second countervailing consideration was a finding that the state requirement of allowing the judge to decide the question was not an integral part of the special relationship created by the statute, but only a "form and mode" of enforcing it.[39]

Almost as an afterthought, Justice Brennan opined that letting the jury have this question probably would not affect the outcome anyway.[40] Thus he paid the Court's respects to *York.*

The latest statement on *Erie* is *Hanna v. Plumer.*[41] Hanna filed suit in the federal district court in Massachusetts against Mrs. Osgood's executor for personal injuries received in an automobile accident. Service of process complied with Federal Rule 4(d)(1), which permits service by leaving a copy of the process at the defendant's house with a competent person. Massachusetts law required "in hand" service.

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[35] *Id.* at 497.
[36] 356 U.S. 525 (1958).
[37] *Id.* at 537.
[38] *Id.*
[39] *Id.* at 539-40.
[40] *Id.* at 540.
[41] 380 U.S. 460 (1965).

The district court, relying on Massachusetts law, granted a motion for summary judgment.[42] The court of appeals affirmed, concluding that the conflict of state and federal rules was substantive, not procedural.[43] The U.S. Supreme Court granted certiorari because the decision posed a real threat to the goal of uniformity of federal procedure.

Chief Justice Warren, writing the *Hanna* opinion, discarded the notion that the *Erie* doctrine was ever meant to act as a check on the Federal Rules of Civil Procedure.[44] He also spurned the "litmus paper criterion" of York's outcome determinative test.[45] He measured the Enabling Act, which created the rules, against the Constitution and found it to be constitutional.[46] This led to the logical conclusion that the rules themselves were valid; therefore, they were to be applied.

IV. The Present State of the Law

A synopsis of the foregoing decisions leads to the following conclusion:

(1) If the question is substantive, apply state law; if it is procedural, apply federal law. (*Erie*).

(2) For the gray areas where it is difficult to determine whether the question is one of substance or procedure, look at the result. If the question is outcome determinative, apply state law. (*York*).

(3) Outcome determinative is only one consideration. If there is an overriding federal interest, such as providing trial by jury, apply federal law. (*Byrd*).

(4) Another overriding federal interest is applying the Federal Rules of Civil Procedure. If there is an applicable rule, it must be applied. (*Hanna*).

None of the above conclusions is free of exceptions and qualifications.

V. Questions Left Unanswered

The responsibility for handling a fellow man's legal affairs is frightening enough in the normal course of events, but in the eerie area of Erie the dearth of objective standards by which the counsellor may guide himself and his clients is appalling.[47]

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[42] Hanna v. Plummer, 331 F.2d 157 (1st Cir. 1964).

[43] *Id.*

[44] Hanna v. Plummer, 380 U.S. at 470.

[45] *Id.*

[46] *Id.* at 471.

[47] Orenstein, *Erie Potpourri*, 38 Conn. B.J. 68, 90 (1940).

The questions left unanswered by the above decisions are so voluminous, so vexing, and so conflicting that it is not feasible to catalog all of the problems they present. A partial listing will focus attention on the major difficulties in this area of the law.

A. Substance-procedure

The hazy line between substance and procedure defies clear definition. Frankfurter said in *York*:

> Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.[48]

For this reason, a particular issue may not invariably be classified as substantive. The same issue may be substantive, when determining whether to apply state law or federal law, and procedural, when resolving conflict of laws questions.[49]

Byrd and *Hanna* left this problem untouched. Even though *York* sought to redefine substance and procedure in terms of outcome determinative, it did not present a satisfactory answer. A literal application of the *York* doctrine would emasculate the federal rules, since every question, procedural or not, is outcome determinative at some point in the litigation.

Hanna has also given rise to substance-procedure questions. There are matters which "are rationally capable of classification as either."[50] The Third Circuit Court of Appeals, in *Provident Tradesmen B.&T. Company v. Lumbermen's Mutual Casualty Company*[51] held that the indispensable party doctrine is not procedural, but declarative of substantive law, affording a substantive right; therefore, the doctrine is beyond the reach of and not affected by the federal rules dealing with necessary joinder of parties. The Supreme Court vacated the judgment, ruling that the federal rule must be considered.[52]

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[48] 326 U.S. 99, 108 (1945).

[49] Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953). For conflict of laws purposes, the survival of a cause of action was treated as procedural in order to apply the law of the forum state. Survival of actions is treated as substantive in diversity suits.

[50] Hanna v. Plummer, 380 U.S. at 472.

[51] 365 F.2d 802 (3d Cir. 1966).

[52] Provident Tradesmen B. & T. Co. v. Patterson, 390 U.S. 102 (1968).

B. What is the state law?

If an issue has neither been conveniently codified, nor decided by a state supreme court, what law does the federal court apply? *Fidelity Union Trust Company v. Field*[53] applied New Jersey law as decided by two vice-chancellors, even though the decision of the vice-chancellors would not have been binding on the New Jersey Court of Errors and Appeals, nor on any other vice-chancellor, nor on the vice-chancellors who had made the decision.

Some federal courts accept state court dicta as binding,[54] thus adding to the conflict within the federal system concerning how to determine state law. Judge Frank of the Second Circuit emphasized the problem: "Perhaps the guessing guide is this: [the federal judge should decide what the] reasonable intelligent lawyers, sitting as judges of the highest New York court . . ." would decide.[55] Judge Jones, for the Fifth Circuit, dismissed this view as an attempt to "psychoanalyze state court judges rather than to rationalize state court decisions."[56] The latest U. S. Supreme Court pronouncement follows Judge Frank's view.[57]

If there is no state law of any kind, according to *Meredith v. City of Winter Haven*,[58] a federal court cannot decline jurisdiction on the grounds that it is unable to determine the state law. A few years later, however, an action was stayed until the state court could construe the statute.[59] Four years later the Court reaffirmed the *Meredith* position.[60] If the federal court does not abstain, it must psychoanalyze; it may not apply its own view of the better law, but it must apply what it thinks the state law would be if there were, in fact, state law. If a question is later decided contra by the state court, the federal court of appeals must reverse the district court, and thenceforth apply the state rule.[61]

If the same question is pending in a state court, the federal courts are more likely to use the abstention doctrine while awaiting the outcome of the state decision.[62] In any event, a state court is not bound by a federal court construction of state law.

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[53] 311 U.S. 169 (1940).

[54] Jess Edwards, Inc. v. Goergen, 256 F.2d 542 (10th Cir. 1958).

[55] Cooper v. American Airlines, Inc., 149 F.2d 355, 359 (2d Cir. 1945).

[56] Polk County v. Lincoln Nat'l Life Ins. Co., 262 F.2d 486, 489 (5th Cir. 1959).

[57] Commissioner v. Estate of Bosch, 387 U.S. 456 (1967).

[58] 320 U.S. 228 (1943).

[59] Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

[60] McNeese v. Board of Educ., 373 U.S. 668 (1963).

[61] Huddleston v. Dwyer, 322 U.S. 232 (1944).

[62] Nolan v. Transocean Air Lines, 365 U.S. 243 (1961). *See* C. WRIGHT, LAW OF FEDERAL COURTS § 58, at 240 (2d ed. 1970). *See also* 20 AM. JUR. 2d *Courts* 214 (1965).

There are presently six states[63] with procedures which allow the federal court to certify questions to the highest state court for an advisory opinion. The state supreme court renders an opinion on a question that is not before it as a case or controversy, but which has been sent by a federal court. The federal court then makes use of this opinion in deciding the case before it. Since this is a new development, followed by so few states, it is difficult to determine whether it is an effective aid to the federal court's search for state law. Many writers look on the procedure as unsatisfactory. It costs time and money and necessarily presents a question in the abstract.[64]

C. Which state's law?

Story created a "brooding omnipresence" of federal common law, and Frankfurter, in *York*, assumed there was an "august corpus" of state law, "to understand which clearly is the only task of any court concerned."[65]

Klaxon v. Stentor Electric[66] gave the federal courts the added difficult task of ascertaining the conflict laws of the forum state. If the state conflict law is unsettled, the federal judge is put in the position of deciding what he thinks the forum state would think that another state would think "on an issue about which neither has thought."[67]

D. What is a federal interest?

The *Byrd* and *Hanna* decisions held that the federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction, and that federal policies as to how the federal courts should be run must be balanced against the policy of providing the same outcome in a federal court as in a state court. If the federal interest is primary, then the state substantive law must yield.

Byrd presented the easy case. Whenever a demand for jury trial is made and challenged, a federal, not a state, issue is presented because the right to trial by jury is irrevocably linked with the Constitution. On many occasions before *Byrd*, the Court had held that a state cannot affect the procedure of a federal court if a litigant is deprived of a jury trial.[68]

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[63] Florida was the first. Hawaii, Maine, Montana, New Hampshire and Washington have followed. C. WRIGHT, LAW OF FEDERAL COURTS 204, n.57 (2d ed. 1970).

[64] *Id.*

[65] Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. at 533 (dissenting opinion).

[66] 313 U.S. 487 (1941).

[67] Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960).

[68] *See, e.g.*, Whitehead v. Shattuck, 138 U.S. 146 (1891).

Hanna, too, was easy; there was a federal rule directly applicable. The Enabling Act, as well as the necessary and proper clause of the Constitution,[69] attest the federal interest in regulating procedure in the federal court system.

Thus, in two situations, the answer would appear clear: if there is a constitutional command, federal interest prevails; if there is an applicable federal rule, and the matter can logically be classified as procedural, federal interest prevails.

The courts have not always so responded. For example, Rule 3 provides that filing a complaint tolls the statute of limitations.[70] *Ragan v. Merchants Transfer & Warehouse Company*[71] ignored the Rule and applied state law, in holding that the filing of a complaint with the court did not toll the statute. *Hanna* distinguished *Ragan* instead of overruling it, although Justice Harlan, in his concurring opinion, found that *Ragan* should be overruled in order to reach the decision in *Hanna*.[72]

Since Hanna, the Eighth and the Sixth Circuits[73] have held state law to control the tolling of the Statute of Limitations rather than Rule 3; both cite *Ragan* as controlling. On the other hand, one district court has found *Ragan* not to control this point.[74]

Neither *Byrd* nor *Hanna* spoke to the situations in which there is neither constitutional command, nor a federal rule, but where a federal interest, power or relation is present. In these cases, the state interest must be balanced with the federal interest. The judge is left with the task of weighing these interests, as well as determining what weights to put on each side of the scale before he begins to balance.[75] Some judges give the federal interest great weight; others treat it lightly. There is no objective standard by which the one is right and the other wrong.[76]

"[T]he constitutional power of the states to regulate the relations among their people does overlap the constitutional power of the federal

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[69] U.S. CONST. art. I, § 8 (18).

[70] FED. R. CIV. P. 3.

[71] 337 U.S. 530 (1949).

[72] Hanna v. Plummer, 380 U.S. at 477 (concurring opinion).

[73] Groninger v. Davison, 364 F.2d 638 (8th Cir. 1966); Sylvester v. Messler, 351 F.2d 472 (6th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1057 (1969).

[74] Callan v. Lillybelle Ltd., 234 F. Supp. 773 (S.D.N.Y. 1964).

[75] *See* Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960).

[76] Wallis v. Pan Am Pet. Corp., 384 U.S. 63 (1966), held that the Court will apply state law, rather than fashion rules of federal common law where application of state law involved no significant threat to any *identifiable* federal policy or interest.

government to determine how its courts are to be operated."[77] When these two powers conflict, there is no satisfactory answer.

In *Hanna* the rule coincided with state policy. What if the rule were in direct conflict with a substantial state policy? How does one determine a substantial, as opposed to a not-so-substantial state policy?

E. What lies outside of Erie?

"There remains an area of law of independent federal judicial decision, outside the constitutional realm, untouched by the decision in *Erie*."[78] Within this area, there exists federal common law. Cases which deal with federal statutes, or involve federal questions or regulations, are beyond *Erie*. Ready examples are found in admiralty, bankruptcy matters, cases arising under the National Labor Relations Act, and cases under one of the various sections of the Civil Rights Act of 1964, such as school suits, and equal employment suits.

VI. The Fifth Circuit Approach

What we see now is like the dim image in a mirror. . . . What I know now is only partial. . . .[79]

The Fifth Circuit Court of Appeals has dealt precisely with some of these difficult questions. With others, the image of the applicable diversity law is dimly presented.

A. Substance-procedure.

The position of the Fifth Circuit in this many faceted area is relatively clear. *Falcon v. Auto Buses Internacionales*[80] underscores the court's position that it must apply state substantive law, but federal procedural standards.

Judge Claude F. Clayton was confronted with the vexing problem of classification of the same matter as substantive for one purpose, procedural for another. He responded with an excellent discussion of the double life of substance and procedure in the *Maryland Casualty Company v. Williams*[81] opinion.

The circuits have differed on whether to apply a federal standard or state law to determine if a corporation is doing business in the state and is therefore subject to the jurisdiction of the federal forum.

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[77] C. Wright, Law of Federal Courts 246 (2d ed. 1970).
[78] *See* 20 Am. Jur. 2d *Courts* 208 (1965).
[79] I Corinthians 13:12 (Good News for Modern Man).
[80] 418 F.2d 673 (5th Cir. 1969).
[81] 377 F.2d 389 (5th Cir. 1967).

The Fifth Circuit concurs with the majority, and holds that state law controls.[82]

B. What is the state law?

The search for the answer to this question has given rise to "that willful, perhaps illegitimate, child of the Erie-Tompkins rule, namely, the 'abstention doctrine.' "[83] The Fifth Circuit guidelines on abstention are bewildering. The most often cited case on the doctrine is a Fifth Circuit case, *Meredith v. City of Winter Haven*.[84] The trial court dismissed the action on the merits;[85] the court of appeals ordered that the dismissal be on abstention grounds.[86] The Supreme Court reversed, and ordered the lower court to reinstate the complaint and to decide the case.[87] Chief Justice Stone announced broadly:

> [T]he difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.[88]

Even so, the law is by no means settled. The Fifth Circuit, with some support among the other circuits, thinks abstention proper in a routine diversity case if the state law is unclear.[89] Supporting this view is *United Services Life Insurance Company v. Delaney*.[90] Judge Brown, in a concurring opinion, discussed his reasons for favoring abstention. He saw diverse results from diverse holdings on substantive law as unfair, and he expressed concern over the fate of the Fifth Circuit decisions when tested in state supreme courts. "Within the very recent past, both Texas and Alabama have overruled decisions of this Court, and the score in Florida cases is little short of staggering."[91]

There are, on the other hand, Fifth Circuit cases which go back to the *Meredith* position and hold that the court must decide the cases

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[82] The leading case is Stanga v. McCormick Shipping Corp., 268 F.2d 544 (5th Cir. 1959). The latest Fifth Circuit cases are the following: 21 Turtle Creek Square, Ltd. v. New York State Teachers' Retirement System, 425 F.2d 1366 (5th Cir. 1970); Smith v. Piper Aircraft Corp., 425 F.2d 823 (5th Cir. 1970).

[83] Clark, *Federal Procedural Reform & States' Rights; to a More Perfect Union*, 40 TEX L. REV. 211, 218 (1961).

[84] 320 U.S. 228 (1943).

[85] Meredith v. City of Winter Haven, 134 F.2d 202, 203-04 (1943).

[86] *Id.* at 208.

[87] Meredith v. City of Winter Haven, 320 U.S. at 238.

[88] *Id.* at 234.

[89] C. WRIGHT, LAW OF FEDERAL COURTS 203 (2d ed. 1970).

[90] 328 F.2d 483 (5th Cir. 1964).

[91] *Id.* at 486.

before it, in spite of unsettled state law.[92] Two years after *United Services,* Judge Brown apparently overcame his concern and wrote the opinion in *Delduca v. United States Fidelity & Guaranty Company,*[93] holding for the court:

> That our task is not an easy one or the footing somewhat unsure in the quest for the Florida rule does not make our obligation any less. We must do the best we can utilizing all the currents which indicate the way the *Erie* wind blows. (citations omitted).[94]

Federal determination of state law is difficult at best; the Erie wind may blow in every direction at once. Again Judge Brown states the duty of the Fifth Circuit:

> Our Erie-commission is to refract these rays (from state decisions) with a wide-angle lens, then focus into a composite picture, not a spectrograph. We thus refine only to meld.[95]

Whether a composite or a spectrograph, the picture presented by the Fifth Circuit decisions in this particular area is indeed dimly seen.

C. Which state's law?

The Fifth Circuit position here is settled and clear. It follows *Klaxon,* applying the conflicts of law rules of the forum state,[96] even if it means that the court must predict the law of another state.[97]

D. What is a federal interest?

The court moved beyond the jury trial and process areas of *Byrd* and *Hanna* in *Monarch Insurance Company v. Spach.*[98] The district court excluded evidence because of the controlling state statute.[99] The court of appeals reversed and remanded, citing the federal rule on evidence.[100] The court balanced the outcome determinative test with "countervailing considerations reflecting substantial federal policies which outweigh in the final balance the aim of like result."[101]

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[92] Peterson v. Klos, 426 F.2d 199 (5th Cir. 1970); Sayers v. Forsyth Bldg. Corp., 417 F.2d 65 (5th Cir. 1969); Insurance Co. of America v. English, 395 F.2d 854 (5th Cir. 1968); Delduca v. United States Fidel. & Guar. Co., 357 F.2d 204 (5th Cir. 1966).

[93] 357 F.2d 204 (5th Cir. 1966).

[94] *Id.* at 206.

[95] Fulton Nat'l Bank v. Tate, 363 F.2d 562, 576 n.24 (5th Cir. 1966).

[96] Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010 (5th Cir. 1969).

[97] Helene Curtis Industries v. Pruitt, 385 F.2d 841 (5th Cir. 1967).

[98] 281 F.2d 401 (5th Cir. 1960).

[99] *Id.* at 404.

[100] *Id.* at 413.

[101] *Id.* at 406.

The Fifth Circuit stays abreast of the U.S. Supreme Court in state law versus federal law decisions, and, at times, moves ahead. Until both courts speak more definitively, however, we will continue to see through the glass darkly.

VII. Conclusion

> *That the doctrine of the* (Erie) *case has proved, in practice, to be a complete failure, there can be no possible doubt. And in its stubborn efforts to make its strange and anomalous doctrine work, the Court, it is clear, has constantly made the situation worse. . . .*[102]

The decisions discussed here represent the efforts of the federal judiciary to cope with the problems that are inherent within the concept of diversity jurisdiction. Given federal diversity cases, the problems will remain—not susceptible to a complete solution, but perhaps open to a more reasoned approach than has been used in the past.

Several approaches suggest themselves:

(1) Abandon federal diversity jurisdiction.

(2) Abandon the Federal Rules of Civil Procedure and apply state procedural, as well as state substantive, law in diversity cases.

(3) Repeal the Rule of Decision Act and apply federal substantive and federal procedural law in all cases in federal court.

Each of the above alternatives would present additional problems. None appears a likely candidate for adoption in the foreseeable future. It is more likely that the law and the problems will remain, altered only by the case by case determinations of the courts.

For the present, the Mississippi attorney must try his cases within the existing decisional framework. The glass through which he views *Erie* may not be quite so dark, and his path not quite so dimly perceived, if he is aware of the existing problems, of the unresolved questions, and of the applicable U. S. Supreme Court and Fifth Circuit decisions.

Jan P. Patterson

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[102] 2 W. Crosskey, Politics and the Constitution 934 (1953).

LIABILITY IN CROP DUSTING: A SURVEY

I. INTRODUCTION

Crop dusting can be a valuable tool to the farmer and a boost to the economy of his farm, but indiscriminate or negligent use of it can result in inestimable damage. Chemicals such as pesticides and herbicides are vital to the health of a farm. Without them the "yields in many of the basic food and fiber crops would be cut from ten to twenty-five per cent,[1] while fruit and vegetable yields would be cut some forty to eighty per cent."[2] These same chemicals, however, can be very destructive, and the farmer cannot use them with absolute impunity. Damage has resulted from the most minute application of some chemicals;[3] therefore, a farmer is under a duty to use them with care. The majority of the states have adopted the view that *due care* must be exercised in crop dusting and that the farmer "may be liable in damages for spreading poisonous dusts and sprays negligently."[4] The result, therefore, has been a conflict of interests which the *courts* of the various states are having to resolve.

Drift of chemicals to adjoining lands is the primary cause of all damage done by crop dusting. There are many factors which come into play when the drift of a particular chemical is predicted. Some of these factors are created by man, while others are caused by nature. The vertical turbulence created by the plane may cause the particles of spray to be suspended long enough for a light wind to carry them onto other lands. Wind, convection, and other air disturbances may also result in a drift of chemicals to adjoining lands. There is also the problem of "secondary" drift which can occur after the particles have settled on the crops, but the greatest danger is that of "primary" drift.[5]

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[1] NATIONAL ACADEMY OF SCIENCES, EVALUATION OF PESTICIDE-WILD-LIFE PROBLEMS, pt. 1, at 4-S (1962), as cited in Note, *Agricultural Pesticides: The Need for Improved Control Legislation*, 52 MINN. L. REV. 1242, 1245 (1968).

[2] *Id.*

[3] It has been estimated that "a millionth of a gram of 2, 4-D will affect a grapevine, and one gram (about a teaspoonful) could produce symptoms on all the vines on five or ten acres." *Hearings before Calif. Dept. Agric.* 92 (Dec. 18, 1951) (testimony of Dr. Alden S. Crafts, Professor of Botany, U. of Calif. at Davis), as cited in Note, *Crop Dusting: Legal Problems in a New Industry*, 6 STAN. L. REV. 69, 71 (1953).

[4] *See, e.g.*, Lawler v. Skelton, 241 Miss. 274, 288, 130 So. 2d 565, 569 (1961).

[5] For a good discussion on the problem of "drift," see Note, *Crop Dusting: Legal Problems in a New Industry*, 6 STAN. L. REV. 69, 71 (1953). *See also* Comment, *Crop Dusting—Scope of Liability and a Need for Reform in the Texas Law*, 40 TEXAS L. REV. 527 (1962).

When damage actually occurs, the injured party may seek relief from three possible sources. He may have a cause of action against: (1) the aerial applicator, (2) the farmer whose land is being sprayed, or (3) the manufacturer of the chemical which was used in the spraying. For purposes of this comment, the liability of the chemical manufacturer will be examined only superficially. Emphasis will be given to the theories of recovery, the duties of the landowner, the possible defenses against recovery, the different statutory regulations, the burden of proof required for recovery, and the responsibility of the applicator, who may or may not be an independent contractor.

Many problems exist as to whether the doctrine of strict liability or ordinary negligence should apply, and whether crop dusting is so "inherently" dangerous or "extra-hazardous" that the duties of the landowner cannot be delegated to an applicator even when the applicator is an independent contractor. A review of the above mentioned areas of concern will hopefully shed some light on the problems that a farmer faces when he tries to improve the economy of his farm by the use of aerial application.[6]

II. The Landowner and the Independent Contractor

The majority of courts in the United States have held that "crop dusting is an activity sufficiently [fraught] with danger to impose liability upon the landowner having the work done if negligence is proven, even though the fault . . . is that of an independent contractor."[7] This is, of course, an exception to the general rule that the employer is not liable for the negligence of an independent contractor, but the exception is usually recognized whenever the work is necessarily dangerous.[8] Since crop dusting has been labeled "inherently dangerous" by most of the courts, this exception has been employed and liability

[6] The problem of chemical pollution and its effect on the environment is beyond the scope of this comment, but an excellent review of this and other related problems can be found in S. Bloom and S. Degler, Pesticides and Pollution (1969). The authors state that "more than 60,000 pesticide formulations based on 500 individual chemical compounds have been registered for sale in the United States." *Id.* at 4.

[7] Loe v. Lenhardt, 227 Ore. 242, 362 P.2d 312, 315 (1961). The court cited the following cases as authority for this proposition: S.A. Gerrard Co. v. Fricker, 42 Ariz. 503, 27 P.2d 678 (1933); Heeb v. Prysock, 219 Ark. 899, 245 S.W.2d 577 (1952); McKennon v. Jones, 219 Ark. 671, 244 S.W.2d 138 (1951).

[8] *See, e.g.*, Leonard v. Abbott, 357 S.W.2d 778 (Tex. Civ. App. 1962), where the court observed that the "courts of this state have always held the employer liable for injuries caused by an independent contractor's negligence in the preformance of inherently dangerous work." *Id.* at 782. *See also* E. L. Jones Constr. Co. v. Noland, 105 Ariz. 446, 466 P.2d 740 (1970); German v. Mountain States Tel. and Tel. Co., 11 Ariz. App. 91, 462 P.2d 108 (1969); Kampmann v. Rothwell, 101 Tex. 535, 109 S.W. 1089 (1908).

imposed on landowners even where the spraying has been done by an independent contractor.[9] Mississippi, in accord with the majority of the states, has held that a farmer may not delegate the dusting or spraying of crops with poisonous insecticides to an independent contractor and avoid liability.[10]

The liability of a crop duster to the landowner who contracted with him in a situation where the landowner's own crops are damaged is beyond the scope of this comment. Generally, then, a plaintiff may have a cause of action against both the operator of a spraying apparatus and the landowner who hires him, when the spray causes damage to his lands and crops.

III. Theories of Liability

Generally, if an injured party can prove that he was in some way damaged by the spraying of chemicals, and if he can show that he was not at fault himself, he is allowed to recover. The courts, however, have used different theories in allowing this recovery, and it is important to discuss each of them.

The majority of the courts have held that the injured party must be able to prove that the spraying was done in a negligent manner. Upon close analysis, however, it is not clear what proof is actually necessary. Some courts require the plaintiff to prove that the defendant failed to exercise due care in applying the spray. The courts that require such proof seem to be very explicit in defining acts which constitute negligence. In *W. B. Bynum Cooperage Company v. Coulter*,[11] the court allowed recovery because the defendant knew of the winds that were blowing toward plaintiff's land during the day and hours of spraying. The court observed that the wind was "strong enough to be felt on one's hand."[12] A failure to notify plaintiff that spraying would be

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[9] *See, e.g.*, Emelwon, Inc. v. United States, 391 F.2d 9 (5th Cir. 1968); Pendergrass v. Lovelace, 57 N.M. 661, 262 P.2d 231 (1953); Leonard v. Abbott, 357 S.W.2d 778 (Tex. Civ. App. 1962).

[10] Lawler v. Skelton, 241 Miss. 274, 130 So. 2d 565 (1961). Those jurisdictions which have adopted the doctrine of strict liability have already made the determination that crop dusting is "inherently dangerous." *See, e.g.*, Loe v. Lenhardt, 227 Ore. 242, 362 P.2d 312 (1961).

[11] 219 Ark. 818, 244 S.W.2d 955 (1952).

[12] 244 S.W.2d at 957. The standard of care required here seems to be contained in the following instruction:

> [I]f the jury should find that agents of the corporation, as reasonable men, ought to have anticipated that the poison, when used in the manner shown, might drift to appellee's property and cause damage and if it is also found that the damage occurred through negligent failure to act prudently, there should be findings for the plaintiffs. [*Id.*, 244 S.W.2d at 958.]

See also Aerial Agricultural Service of Montana v. Richard, 264 F.2d 341

done on a particular day has been held sufficient to hold a defendant liable,[13] and spreading of poison so close to plaintiff's fence that his cattle could reach it has also been held sufficient.[14] While these courts require a specific act of negligence, it would appear that they are willing to allow recovery upon the introduction of the slightest evidence which would tend to establish negligence.

Another line of decisions seems to indicate that all the plaintiff must do in order to recover is to show that defendant's act *caused* the injury. A good example of this can be found in *Miles v. Arena.*[15] In that case the dusting was done while the wind was blowing directly toward the plaintiff's bees. The court found that it was defendant's poisonous dust which drifted to plaintiff's bees and killed them. In holding for the plaintiff, the court stated:

> [I]n itself, dusting vegetables to kill pests that prey upon them is a necessary and lawful operation which the owner of the vegetables may perform, either himself or through servants, or may have performed by an independent contractor. However, he should not do the dusting, or have it done, under conditions which indicate to a reasonably prudent person that damage to his neighbor would result.[16]

Another good example of how the courts are willing to allow recovery upon the showing of mere causation is found in *Kentucky Aerospray v. Mays.*[17] The defendant was spraying his tobacco patch, which was about 110 feet from plaintiff's minnow pond. Some of the spray settled on the pond and poisoned the fish. The court found the defendant negligent and liable, but the only reason offered in support of the court's holding was that defendant had allowed the

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(5th Cir. 1959), where defendants were held to be negligent in spreading the seed in an uneven manner.

[13] Brown v. Sioux City, 242 Iowa 1196, 49 N.W.2d 853 (1951). The cause of action here was against the city of Sioux City for damages arising out of the killing of plaintiff's bees and the spoiling of his honey, which was located at a municipal airbase on acreage rented from the city. The plaintiff alleged that the city was negligent in "failing to notify plaintiff of its intention to spray the premises with a piosonous substance, which premises were being worked by the bees." *Id.* at 1200, 49 N.W.2d at 855.

The court found the city negligent in this respect and further observed that it was the "landlord's duty to use reasonable care [and] prudence in the use of the land retained and not to injure the tenant in his use of the premises he rents." *Id.* at 1201, 49 N.W.2d at 855.

[14] Underhill v. Motes, 158 Kan. 173, 146 P.2d 374 (1944).

[15] 23 Cal. App. 2d 680, 73 P.2d 1260 (1937).

[16] 73 P.2d at 1262.

[17] 251 S.W.2d 460 (Ky. 1952).

chemical compound to settle in the pond during the spraying operation.[18] Under this line of decisions the proof of causation, rather than proof of negligence, is the important consideration.

Liability has also been found where the only evidence seemed to be that of dusting itself.[19]

In a similar case, the defendant was having his land sprayed with a chemical compound, part of which drifted some eight hundred feet over plaintiff's land, killing his bees. After discussing the facts of the case, the court found the defendant guilty of negligence.[20] The only negligence in the case, apparently, was the drift itself. Another court held spraying to be a negligent act if defendant knew or should have known that the spray might cause damage.[21] The court in that case found that it was a fair deduction that defendant knew or had reason to believe that the poison would be injurious to the growing cotton. The court stated that "since it was used to kill weeds and other kinds of vegetation, it was incredible to suppose that defendant could have had no fear that it would also kill growing cotton."[22]

The courts which require only a showing of causation speak in terms of negligence, but they seem to be applying the doctrine of strict liability. One writer,[23] in trying to reconcile the two theories, has said that under the negligence theory, the risk of damage being done is said to be outweighed by the utility of the act, and liability is imposed only for negligence. "Conversely, under the strict liability theory, the risk is said to outweigh the utility of the act; therefore, the one benefiting from the activity should pay for any damage caused regardless of fault."[24] The courts, however, are either unaware of this distinction, or they have refused to give it any consideration.

An analysis of the decisions which have *expressly* adopted the doc-

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[18] While *not* admitting to a standard of absolute liability, the court stated:

> [T]he appellant must admit that it had no right to permit its poisonous spray to fall into appellee's pond and thereby cause the loss of all the minnows. . . . By like token . . . if appellant allowed the chemical compound to fall and settle in the pond . . . so that the minnows were poisoned, appellant was guilty of negligence. [*Id.* at 462.]

[19] Kennedy v. Clayton, 216 Ark. 851, 227 S.W.2d 934 (1950). The dusting by itself, seems to have been the act of negligence here. There would, of course, have to be a causal connection between the dusting operation and the damage done, but the court was willing to allow the mere act of dusting to constitute negligence.

[20] Lundberg v. Bolon, 67 Ariz. 259, 194 P.2d 454 (1948).

[21] Schultz v. Harless, 271 S.W.2d 696 (Tex. Civ. App. 1954).

[22] *Id.* at 698. The court, however, does not indicate *why* the defendant should have known: because of harmful ingredients, or because of some other factors?

[23] Note, *Regulation and Liability in the Application of Pesticides*, 49 IOWA L. REV. 135 (1963).

[24] *Id.* at 143.

trine of strict liability show how closely related the two theories are as applied to crop dusting. These decisions indicate that the courts which give verbal sanction to the theory of negligence are, in effect, reaching the same results as the courts which apply the theory of strict liability.

Presently, Louisiana, Oklahoma, and Oregon are the only states which have *expressly* adopted the theory of strict liability. In 1961 the Supreme Court of Oklahoma held that a landowner who uses weed killer does so at his own peril and will be liable for damage caused to a neighbor's land, regardless of negligence or precautions.[25] The court added that "any precautions [the] defendant's agent may have taken to prevent the injuries . . . do not serve to extinguish his liability. The question in general is not whether defendant acted with due care and caution, but whether his acts occasioned the damage."[26]

In *Loe v. Lenhardt*,[27] the Oregon court observed that crop dusting is capable of inflicting damage upon neighboring crops, notwithstanding the exercise of the utmost care by the applicator; therefore, the doctrine of strict liability would apply. The court concluded by saying that in such a case it was the voluntary taking of the risk, rather than the intention to invade the plaintiff's land, which imposed liability.[28] In other words, liability would be imposed in the case of an unintentional invasion when damage arose out of some extrahazardous activities. The Supreme Court of Louisiana[29] has also declared that negligence is not a prerequisite to liability in crop dusting and has applied the doctrine of strict liability.

There are many valid reasons for using the doctrine of strict liability. Perhaps Professor Prosser sums it up best: in instances involving abnormally dangerous conditions or activities, the courts have recognized the new doctrine that the defendant's enterprise, while it will be tolerated by other law, must pay its way. The basis of the liability is the defendant's intentional behavior in exposing those in his vicinity to such a risk.[30]

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[25] Young v. Darter, 363 P.2d 829 (Okla. 1961).

[26] *Id.* at 833-34.

[27] 227 Ore. 242, 362 P.2d 312 (1961).

[28] 362 P.2d at 318.

[29] *See, e.g.*, Gotreaux v. Gary, 232 La. 373, 94 So. 2d 293 (1957), wherein the court stated:

> [I]n these instances [negligence or fault] is not a requisite to liability, irrespective of the fact that the activities resulting in damages are conducted with assumed reasonable care and in accordance with modern and accepted methods. [*Id.* at 378, 94 So. 2d at 295.]

See also Romero v. Chris Crusta Flying Service, Inc., 140 So. 2d 734 (La. App. 1962); Trahan v. Beard, 138 So. 2d 420 (La. App. 1962).

[30] W. PROSSER, LAW OF TORTS § 74, at 508 (3d ed. 1964).

IV. Defenses

A defendant in a strict liability jurisdiction normally has no defense, but there are several defenses available if the defendant is in a jurisdiction which still applies the standards of negligence.[31]

The most frequently used defense is that the plaintiff has either failed to prove causation or was contributorily negligent. Defendants who had no previous experience as to the floating quality of dust have also escaped liability. In *Chapman Chemical Company v. Taylor*[32] the defendant had consulted the Rice Growers Association regarding the chemical he was about to use. The association informed the defendant that the spray was safe to use, and it appeared from the evidence that he had no previous experience in the use of agricultural chemicals. The court stated that the spraying itself was done without negligence and that there was *no* evidence on which to predicate liability except the single fact that defendant did use a dangerous chemical.

Applying the same criterion, the Arkansas court reached a different result in *Burns v. Vaughn*.[33] In that case the drifting nature of the chemical used was a matter of general knowledge in the vicinity because of a previous dusting operation which had damaged other crops. The local county agent had a large amount of information on the subject which the defendant could have easily obtained. The defendant also testified that he had knowledge of the dangerous properties of the dust and had, in fact, instructed his pilot not to release the chemical if there were any wind blowing at the time of dusting. The court found that the evidence was sufficient to make the issue of negligence a matter for the jury, and a judgment for the plaintiff was affirmed.

A landowner who gave notice of impending dusting operations escaped liability because the owner of the bees refused, or failed, to take any measures to protect them. An example of this type of situation can be found in *Lenk v. Spezia*.[34] The plaintiff alleged that the defendant negligently dusted tomato crops from an airplane, permitted the dust to drift on to his bee hives, and deposited the spray on the feeding fields of the bees. The court found that the defendant did not

[31] Governmental immunity as a bar to recovery is not discussed in this comment, even though there have been several cases dealing with it. *See, e.g.*, Neff v. Imperial Irrigation Dist., 142 Cal. App. 2d 755, 299 P.2d 359 (1956), where the court dismissed the complaint and held that the damage to the plaintiff's crop was the result of careless application, but it did *not* amount to a taking of property for a public use. *See also* Harris v. United States, 205 F.2d 765 (10th Cir. 1953).

[32] 215 Ark. 630, 222 S.W.2d 820 (1949).

[33] 216 Ark. 128, 224 S.W.2d 365 (1949).

[34] 95 Cal. App. 2d 296, 213 P.2d 47 (1949).

spread the dust negligently, or at all, upon the plaintiff's bees or upon their feeding grounds. The court, to the contrary, found that the bees probably died from poisoned insecticide which they procured in other fields while they were ranging in search of nectar or pollen. In conclusion, the court stated:

> [I]f plaintiff's bees procured the poisonous compound from which they died while they were trespassing on the fields of other owners of land, it appears that the plaintiff could not recover damages unless the poison was distributed wantonly, maliciously, or with the deliberate intent to injure or destroy the bees. There is no evidence in this case of such wanton or malicious conduct.[35]

If the plaintiff fails to establish a *causal connection* between the dusting and the damage, he, of course, cannot recover. Such was the case in *Wall v. Trogdon*,[36] an action by several plaintiffs against a company which was engaged in the business of spraying crops by aircraft. The plaintiffs claimed that the spraying done on adjoining lands damaged the fish in nearby lakes. In holding for the defendant company, the court stated that the evidence sustained the findings that there was no causal connection between the death of the fish and the operation of the aircraft. In regard to causation, the court stated that the breach of duty must be the "proximate cause of the injury—a cause that produced the result in continuous sequence, and without which it would not have occured. . . ."[37]

There are a few instances where the plaintiff has failed to establish the wind conditions at the time of the spraying, the areas which were actually sprayed, or the manner in which the spraying was done. In such a case, the court will allow the jury to determine the negligence of the defendant.[38]

It is interesting to note that at least one case has held that a plaintiff's alleged contributory negligence did not bar recovery.[39] The defendants in that case alleged that the plaintiff was guilty of contributory negligence in continuing to feed chopped green alfalfa to his cattle after he had observed white dust upon the alfalfa leaves after the crop dusting process was completed. Defendants claimed that it was the duty of the plaintiff to discontinue feeding his growing crops to his

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[35] *Id.*, 213 P.2d at 51. This has sometimes been called the "trespassing bees" theory. For a more detailed discussion of this and other related cases, see Annot., 12 A.L.R. 2d 436, 441-42 (1950).

[36] 249 N.C. 747, 107 S.E.2d 757 (1959). *See also* Bowden v. United States, 200 F.2d 176 (4th Cir. 1952).

[37] 249 N.C. at 753, 107 S.E.2d at 761.

[38] *See, e.g.*, Council v. Duprel, 250 Miss. 269, 165 So. 2d 134 (1964).

[39] Sanders v. Beckwith, 79 Ariz. 67, 283 P.2d 235 (1955).

cattle, and that he could have procured feed from some other sources. In dismissing the defendants' allegation, the court stated:

> [I]f the acts of plaintiffs constitute negligence, they occurred subsequent to the negligent trespass of defendants and may have aggravated the consequences of defendants' negligence in depositing the poisonous insecticide upon plaintiff's growing crops, but did not concur therewith and therefore do not constitute contributory negligence.[40]

This case further illustrates the attitude of the courts in allowing recovery to an individual who has been injured by crop dusting.

V. Burden of Proof

From a reading of the cases, it would seem that, except in a few instances, the plaintiff recovers when he has established causation and damage. There is little difficulty in a fact situation involving only one defendant, or where the defendant's airplane is the only one dusting in the area. A more difficult problem arises, however, when there are several crop dusters operating near plaintiff's land. Proving causation may be difficult since the damage may have been caused by the acts of any, or all. The problems facing the plaintiff in this type situation are manifest.

If the plaintiff is in a jurisdiction that requires proof of negligence to obtain recovery, then it is obvious that he must establish a lack of due care. The plaintiff may not, in fact, have sufficient knowledge of defendant's conduct to establish the lack of due care, and this in itself may defeat his claim for damages. While the plaintiff may be able to prove that at least one of the defendants is responsible for the injury, he may be unable to prove which particular one caused the injury. Crop dusters usually work independently of each other; therefore, it would be very difficult to show any "concert of action." If there is no concert of action, then it is impossible to say that they are joint tort-feasors and responsible for the negligence of each other.[41] In these circumstances a recovery by the plaintiff is virtually impossible unless he can establish which particular defendant caused the damage.[42]

There is a line of cases that might come to the aid of a plaintiff in such a situation. The cases do not involve damage incurred while crop dusting, but the principles seem to be applicable to such a situation. In *Summers v. Tice*[43] the plaintiff was shot by one of two hunters

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[40] *Id.*, 283 P.2d at 238.

[41] W. Prosser, Law of Torts § 43, at 258 (3d ed. 1964).

[42] *Id.*

[43] 33 Cal. 2d 80, 199 P.2d 1 (1948).

and was unable to prove exactly which one caused the injury. In holding for the plaintiff, the court stated:

> [I]f defendants are independent tort feasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment.[44]

The court expressly abandoned the "concert of action" requirement and said that each one of the defendants must negate causation to escape liability.[45] Other courts have expressed the view that where tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all the wrongdoers will be held jointly and severally liable for the entire damage.[46] If these principles are applied to a crop dusting situation, the plaintiff would have to allege that each of the defendant's spray fell upon his land, but he would not be required to prove specific damage caused by each defendant.[47]

There seems to be no line of cases which apply the doctrine of *res ipsa loquitur* to crop dusting. If this doctrine were applicable, the plaintiff could much more easily prove his case. The first requirement of the doctrine is met: the instrumentality is in the exclusive control of the defendant. The event, however, must be of a type which ordinarily does not occur in the absence of someone's negligence.[48] This last requirement is not met since damage from crop dusting can occur while one is using the greatest of care. If the plaintiff could persuade the court to drop this formalistic barrier, he would have little trouble obtaining relief. The best approach, however, would seem to be that which was discussed earlier, viz, although injury cannot be apportioned with reasonable certainty, the innocent, wronged party should not be deprived of his right to redress.

VI. Statutory Regulation

Most states now recognize the inherent dangers of crop dusting

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[44] 199 P.2d at 5.

[45] *Id.*

[46] *See, e.g.*, Copley v. Putter, 93 Cal. App. 2d 453, 207 P.2d 876 (1949); Hackworth v. Davis, 87 Idaho 98, 390 P.2d 422 (1964); Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952).

[47] This approach is not unique. For a more detailed discussion of it and other theories, see Comment, *supra* note 5, at 539.

[48] W. Prosser, Law of Torts § 39, at 218 (3d ed. 1964).

and have enacted legislation in an attempt to control its application.[49] There is no question that a state has the power to regulate such activities. It is an exercise of the state's police power to protect the health and welfare of its people.[50]

The most common regulation is the licensing of crop dusting pilots, which usually requires that a pilot demonstrate competence in the special techniques of crop dusting. Licensees are usually required to pass an examination or otherwise demonstrate that they possess adequate knowledge concerning the use of chemical pesticides, proper techniques in their application, and the dangers involved in their use.[51] Violations of the statute may lead to suspension of an applicator's license and/or a fine.[52] Most states also require that an applicant show proof of financial responsibility as a prerequisite to licensing.

A typical statute which requires proof of financial responsibility would read as follows:

> Any person seeking to obtain a license as an applicator in this state shall submit proof of financial responsibility to the board, and upon obtaining a license, such person shall maintain proof of financial responsibility at all times while such license shall be in effect.[53]

As mentioned above, a violation of the statute is usually declared a misdemeanor, subjecting the violator to a fine, imprisonment, or both.[54] But observance of the regulations will not relieve a crop duster from liability. Most statutes will still allow any person, firm, or corporation having a right of action against an aerial applicator to bring a suit for any damages caused by the negligence of the applicator.[55]

VII. Manufacturer's Liability

A manufacturer's or dealer's liability to a remote purchaser or third person is not automatic and must be viewed in light of each fact situation.[56] In *Chapman Chemical Company v. Taylor*[57] the judgment

[49] *See, e.g.*, Idaho Code Ann. §§ 22-2208 to 22-2230 (1949). Miss. Code Ann. §§ 5000-21 to 5000-23 (Supp. 1968).

[50] *See* Leonard v. Abbott, 357 S.W.2d 778 (Tex. Civ. App. 1962), where the court stated that "the declared purpose of the [Herbicide Control Act] is to invoke the police powers of the State to regulate the sale, use and transportation of hormone herbicides. . . ." *Id.* at 781.

[51] *See, e.g.*, Ore. Rev. Stat. § 573.001 (1969).

[52] *See, e.g.*, Colo. Rev. Stat. Ann. § 6-14-10 (1963).

[53] Miss. Code Ann. § 5011-07 (Supp. 1968).

[54] *See, e.g.*, N.J. Rev. Stat. § 4:8A-8 (1959).

[55] Miss. Code Ann. § 5011-07 (Supp. 1968).

[56] The manufacturer is, of course, not liable for the negligent spraying or for the drift which may occur. The manufacturer's liability is predicated upon other factors as will be discussed herein.

[57] 215 Ark. 630, 222 S.W.2d 820 (1949).

against the manufacturer was affirmed because the manufacturer, although cautioning buyers that the chemical should be applied in such a manner as to avoid broad-leaved plants, recommended the application of the chemical by airplane even though no previous tests were made of the floating qualities of the chemical. The court explained that:

> [The chemical company was not excused] from liability by the mere showing that it was unaware of the peculiar carrying quality of the dust it was selling. Ordinary care required that it should know in view of the dangerous nature of the product it was selling, and it was charged with the knowledge which tests would have revealed.[58]

The manufacturer may also be liable if the plaintiff has written a letter seeking information about proper use of the chemical, and the manufacturer replies with a letter which can be construed as a recommendation for the product although it knew, or should have known, that the product was dangerous to the particular crops of the plaintiff.[59] However, if the chemical can be used safely by observing certain precautions, and those precautions are known to the person using the chemical, then the manufacturer cannot be held to "strict liability" for the damage resulting from its negligent use.[60] This would seem only fair, particularly if the manufacturer has done all he could to prevent damage to crops.

In most of the cases in which the manufacturer has been held liable, the manufacturer should have taken some action to either test the chemical or warn the plaintiff of its destructive nature.[61] If the evidence fails to show the manufacturer's negligence, that the negligence proximately caused the damage, or that the manufacturer breached any implied warranty of fitness, then the only equitable solution is to exonerate the manufacturer and make the plaintiff seek relief from either the aerial applicator or the landowner whose land is being sprayed.

VIII. Conclusion

The expanded use of herbicides and insecticides has created a pressing social need for more federal and state regulation. The courts, too, must adopt a conscious policy or standard.

Courts which profess to apply the theory of negligence but actually

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[58] *Id.*, 222 S.W.2d at 827.

[59] Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wash. 469, 403 P.2d 351 (1965).

[60] Walton v. Sherwin-Williams Co., 191 F.2d 277 (8th Cir. 1951).

[61] *See* Wise v. Hayes, 58 Wash. 106, 361 P.2d 171 (1961), where the manufacturer was held liable on the grounds of improperly labeling the crop spray.

apply the theory of strict liability are only adding confusion and uncertainty to the law of negligence. The decision of whether strict liability or traditional negligence principles should be applied calls for a balancing of social interests. Public policy should, of course, be the yardstick by which this conflict is resolved. The question is whether or not the activity should pay its way. Strict liability is usually imposed where the risk of harm outweighs the benefit to be received from the hazardous enterprise, thereby throwing the loss on the party benefiting from the spraying. Perhaps this is the best policy.

Regardless of which standard the courts decide to adopt, the theory should be chosen as a matter of conscious policy so that the parties who are affected will know exactly where they stand in relation to the law.

C. Gray Burdick

STUDENT NOTES

Criminal Procedure—Miranda Warnings in Criminal Tax Fraud Cases

The Fifth Circuit Court of Appeals, in the recent case of *United States v. Prudden*,[1] ruled "that *Miranda* warnings[2] are not constitutionally required in tax investigation cases where the taxpayer is not deprived of his freedom and is not actually compelled or coerced to furnish statements or documents."[3]

On May 10, 1963, Revenue Agent Clausson P. Lexow was assigned a civil audit of Florida Corporation of America (FCA) and its subsidiaries for the years 1960 through 1962. Lexow contacted the president of the parent corporation and commenced the examination on May 31, 1963. Prior to the examination, agent Lexow was told by Prudden that he (Prudden) was a director and the legal advisor of FCA. Prior to agent Lexow's first meeting with Prudden on June 17, 1963, he had discovered what he considered to be "badges of fraud," and his investigation had been expanded to include the personal returns of Prudden and his sons. At this initial meeting, Agent Lexow did not inform Prudden of his suspicion of fraud.

One of the transactions under investigation by Lexow was the manner in which Prudden had reported the sale in 1960 of stock in First Southeast Corporation, a theatre corporation, on his and his son's tax returns. The stock was to be paid for over a period of twenty years, and Prudden repeatedly asked Lexow how to report the sale on future returns and how to report a connected $52,000 escrow item. Lexow told Prudden that at the conclusion of the investigation he would advise him on how the transaction should be handled.

On July 3, 1963, Lexow began a report referring the case to the Intelligence Division of the Internal Revenue Service for a criminal investigation.[4] The report was completed on July 15, 1963; on August 14, 1963 the criminal investigation was begun. The investigation was to be conducted by revenue agent Lewis E. Stanley and special agent Edward

[1] 424 F.2d 1021 (5th Cir. 1970).

[2] Miranda v. Arizona, 384 U.S. 436 (1966). The warnings, as stated by Chief Justice Warren, are:

> Prior to any questioning, the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. [*Id.* at 444.]

[3] United States v. Prudden, 424 F.2d at 1030.

[4] Internal Revenue Service revenue agents are concerned only with civil tax investigation and civil tax liability. The function of the special agents of the Intelligence Division is to investigate suspected criminal tax fraud cases and "[h]is primary purpose is to uncover evidence to support a criminal prosecution." Lipton, *Constitutional Rights in Criminal Tax Investigations*, 45 F.R.D. 323, 331 (1968) [hereinafter cited as Lipton]. *See also* United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967).

M. Cohen. According to Internal Revenue Service policy, agent Lexow "was off the case" after August 14, 1963. However, on August 28, 1963, agent Lexow, in a letter[5] to Prudden, requested copies of certain documents relating to the sale of the theatre corporation stock. In this letter, Lexow informed Prudden that he was no longer on the case and asked his cooperation with revenue agent Stanley. No mention was made of the fact that the case had been transferred to the Intelligence Division or that special agent Cohen was now in charge of the investigation. Prudden responded to Lexow's letter suggesting a meeting with revenue agent Stanley on October 1, 1968. Revenue agent Stanley replied to the letter[6] on September 13, 1963, suggesting a time and place for the meeting. In this letter, Stanley did not inform Prudden that special agent Cohen was in charge of the investigation.

When Cohen and Stanley met with Prudden on October 1, 1963, they introduced themselves as special agent and revenue agent respectively and presented their credentials. However, Prudden testified that he did not know the significance of the distinction between a revenue and a special agent. They informed Prudden that they planned to audit his personal income tax returns and those of his sons and the returns of FCA and its eight subsidiaries. The agents did not tell Prudden that the audit was a criminal investigation. They also did not warn Prudden of his right to remain silent; they did not inform him that anything he said or documents he produced could subsequently be used against him; and they did not advise him of his right to counsel.

The investigation continued for fifteen months with all but one

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[5] Dear Mr. Prudden:

Before you left on the 9th of August you made copies of some papers for me which I left in your office by mistake. I would appreciate it if you would have your secretary, Mrs. Smith, make them available to me. It is necessary that I have them to properly verify your returns. . . .

. . . .

At my request the Government is moving me to our Ocala, Florida office, in order that my wife and I can take advantage of the educational facilities at the University of Florida. Your return along with the others under examination are being transferred to Agent Lewis E. Stanley of this office. Please address all future correspondence to him.

You have been most cooperative in this examination to date, I trust that you will extend the same courtesy to Agent Stanley. [United States v. Prudden, 424 F.2d at 1024, n.4.]

[6] Dear Mr. Prudden:

This is in reference to your letter dated September 9, 1963. Your suggestion of an appointment at 9:00 A.M., Tuesday, October 1, 1963, is satisfactory with me.

Therefore, I will meet you at 238 Royal Palm Way, Palm Beach, Florida, at 9:00 A.M., Tuesday, October 1, 1963.

Thank you for your reply to Mr. Lexow's letter.

Very truly yours,

L. E. Stanley,
Internal Revenue Agent

[Brief for Appellee at 6-7, United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970).]

interview conducted during regular business hours at Prudden's office. A single interview was held at the Internal Revenue Service Intelligence Division office on December 21, 1964, in which Prudden answered questions but refused to allow the conversation to be recorded. The agents testified that Prudden was cooperative during the entire investigation with the exception that he criticized certain third-party investigations and would not provide records for Research and Development, Ltd., Corporation or records which he considered outside the years under investigation.[7]

Prudden was indicted on seventeen counts of income tax evasion. At the trial, Prudden moved the district court for an order suppressing the evidence obtained by revenue agent Stanley and special agent Cohen on the ground that such evidence was "obtained through fraud, deceit and trickery on the part of the government's agents and in violation of defendant's fifth and sixth amendment rights under the United States Constitution."[8] The district court, in granting the motion to suppress, stated:

> On the facts presented to the Court, it is clear that the Internal Revenue Service agents engaged in a deliberate scheme to deceive defendant in order to prevent his suspecting that the nature of the investigation had altered materially. Revenue agent Lexow established a friendly rapport with defendant and indicated that he would assist defendant in reporting a certain large item on a future return. After the referral of defendant's case, Agent Lexow maintained the cordial tone of his correspondence, complimenting defendant on his cooperation. His reference to the transfer of the case to Revenue Agent Stanley was calculated to raise no suspicion, and the fact that Special Agent Cohen would be in charge of the Intelligence Division investigation was omitted.[9]

Although the absence of *Miranda* warnings was not a consideration in the ruling upon the motion to suppress,[10] Judge Clark gave a comprehensive analysis of the issue's history in tax investigation cases in the Fifth Circuit because of the Supreme Court's 1968 decision in *Mathis v. United States*[11] and the Seventh Circuit's recent holdings in *United States v. Dickerson*[12] and *United States v. Habig*.[13]

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[7] United States v. Prudden, 424 F.2d at 1022-25.

[8] United States v. Prudden, 305 F. Supp. 110, (M.D. Fla. 1969).

[9] *Id.* at 111. The Fifth Circuit reversed this ruling, holding that an examination of the entire record revealed no evidence of fraud, deceit, or trickery by the agents. The court also held that Prudden had not sustained his burden of proof on the motion to suppress by showing fraud by clear and convincing evidence. United States v. Prudden, 424 F.2d at 1031-35.

[10] Prudden did not rely upon Miranda to support this motion and the district court indicated that "a deliberate scheme to deceive," and not Miranda, was the basis for its ruling. However, Prudden made it clear that he was not abandoning the failure to give the Miranda warnings as a defense. Brief for Appellee at 28, United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970).

[11] 391 U.S. 1 (1968).

[12] 413 F.2d 1111 (7th Cir. 1969).

[13] 413 F.2d 1108 (7th Cir. 1969), *cert. denied*, 396 U.S. 1014 (1970).

The fifth amendment provides "[N]o person shall . . . be compelled in any Criminal Case to be a witness against himself. . . ."[14] Before *Escobedo v. Illinois*[15] was decided in 1964, the Supreme Court had developed the general rule that a confession obtained involuntarily, by actual physical or psychological coercion, was inadmissible.[16] In *Escobedo,* the Court qualified the voluntary-involuntary confession test developed in this line of cases and extended the suspect's sixth amendment right-to-counsel privilege to the pre-indictment stage of a criminal proceeding to protect the fifth amendment privilege against self-incrimination.[17] The court indicated the "stage" at which the suspect has the right to counsel:

> We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and under the circumstances here, the accused must be permitted to consult with his lawyer.[18]

Miranda, decided two years later, was an attempt by the Court to clarify the ambiguity of the *Escobedo* ruling[19] "and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[20] Chief Justice Warren succinctly stated the crux of the privilege:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[21]
>
> This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused. [Footnote by the Court.][22]

This footnote in *Miranda* has resulted in the general adoption of the "custodial interrogation" language of *Miranda* in post-*Miranda* cases instead of the more flexible "accusatory stage" concept of *Escobedo.*[23] In comparing the two decisions, one commentator observed

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[14] U.S. CONST. amend. V.

[15] 378 U.S. 478 (1964).

[16] Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).

[17] Williams, *The Criminal Versus Society: Some Observations on the Accommodation of Mississippi Criminal Procedure to the Evolving Concepts of "Constitutionalized" Due Process,* 38 MISS. L.J. 57, 63 (1966).

[18] Escobedo v. Illinois, 378 U.S. at 492.

[19] Williams, *supra* note 17, at 63.

[20] *Id.* at 65.

[21] Miranda v. Arizona, 384 U.S .at 444.

[22] *Id.,* n.4.

[23] Lipton, *supra* note 4, at 336.

that the standard of *Escobedo* was an inquiry into the "stage" which the examination had reached, investigatory or accusatory, contrasted with *Miranda* which relied upon a "subjective inquiry into the state of mind of the suspect to determine when he is entitled to his constitutional rights" with "the important consideration . . . [being] . . . the time that the suspect himself begins to feel as though he is under compulsion to incriminate himself."[24]

The self-incrimination issue has been raised in a number of non-custodial criminal tax fraud investigation cases, and the majority of district courts and every circuit court of appeals (except the Seventh) [25] have held that the *Miranda* warnings are not required where the suspect is not in custody or deprived of his freedom in any significant way.[26]

The Supreme Court's decision in *Mathis v. United States*[27] was one of the factors that prompted the exhaustive analysis of the *Miranda* issue in the *Prudden* case. In *Mathis,* the defendant was serving a sentence in the Florida State Penitentiary when he was interviewed by an I.R.S. revenue agent who was conducting a civil audit. The case was subsequently transferred to the Intelligence Division, and the evidence gathered in the initial interview was used against Mathis in a trial for criminal tax fraud based upon claims of tax refunds from the defendant's individual income taxes for 1960 and 1961.

Mathis objected that he was not given any of the warnings required by *Miranda* at the initial interview conducted when he was in custody on the unrelated charge. The defendant's conviction was affirmed by the Fifth Circuit, which held that the warnings were not required in a routine tax investigation conducted to determine civil, rather than criminal, tax liability. The interview, although conducted while Mathis was in custody, did not involve the compulsion to answer that was present in *Miranda.* The Supreme Court reversed the decision, holding that the warnings were required in any case of custodial interrogation without regard to the fact that the cause of the confinement was unrelated to the tax investigation. In answer to the government's contention that the investigation did not require the *Miranda* warning because it was initiated as a civil investigation, Mr. Justice Black stated:

It is true that a 'routine tax investigation' may be initiated for

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[24] Comment, *Constitutional Rights of the Taxpayers in a Tax Fraud Investigation,* 42 TUL. L. REV. 862, 873 (1968).

[25] *See* cases cited notes 12 and 13 *supra.*

[26] *See, e.g.,* United States v. White, 417 F.2d 89 (2d Cir. 1969), *cert. denied,* 397 U.S. 912 (1970); Spahr v. United States, 409 F.2d 1303 (9th Cir. 1969), *cert. denied,* 396 U.S. 840 (1969); United States v. Mackiewicz, 401 F.2d 219 (2d Cir. 1968); United States v. Maius, 378 F.2d 716 (6th Cir. 1967), *cert. denied,* 389 U.S. 905 (1967); Selinger v. Bigler, 377 F.2d 542 (9th Cir. 1967), *cert. denied,* 389 U.S. 904 (1967); Morgan v. United States, 377 F.2d 507 (1st Cir. 1967); United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967); United States v. Kubik, 266 F. Supp. 501 (S.D. Iowa 1967); United States v. Bachman, 267 F. Supp. 593 (W.D. Pa. 1966).

[27] 391 U.S. 1 (1968).

> the purpose of a civil action rather than criminal prosecution. To this extent tax investigations differ from investigations of murder, robbery, and other crimes. But tax investigations frequently lead to criminal prosecutions, just as the one here did. In fact, the last visit of the revenue agent to the jail to question petitioner took place only eight days before the full-fledged criminal investigation concededly began. And as the investigating revenue agent was compelled to admit, there was always the possibility during his investigation that his work would end up in a criminal prosecution.[28]

In *Dickerson v. United States*[29] the defendant was indicted for failure to file income tax returns for 1960, 1961, and 1962. The district court granted the defendant's motion to suppress certain evidence based on the objection that the defendant was not advised of his rights as required by *Miranda*. The Seventh Circuit affirmed the district court, holding that the *Miranda* warnings must be given by either a revenue agent or a special agent at the first meeting with the taxpayer after the case has been transferred to the Intelligence Division of the Internal Revenue Service.[30]

The court acknowledged the limitations of the exact factual situation in *Miranda*. However, the court chose to look to the policy underlying the *Miranda* privilege and applied *Miranda's* "over-riding concern for intelligent exercise of constitutional rights."[31] In rejecting the government's contention that *Miranda* was not applicable because of the absence of custodial interrogation and evidence of compulsion, the court stated:

> We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an *intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances.* No contention is made that the privilege against self-incrimination does not protect one interrogated in a non-custodial setting, only that one in such circumstances has no need of advice as to his rights, or, indeed, of the pendency of a criminal investigation at all. But custodial interrogation is merely one variety of confrontation, albeit one requiring the most stringent of protections for the criminal suspect. *The inquiry does not end with custody or its absence.* [emphasis added].[32]

The coercion and pressure on the suspect to incriminate himself in a tax fraud investigation come not from custodial interrogation, but from ignorance of the consequences of his cooperation.[33] A portion

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[28] Mathis v. United States, 391 U.S. at 4.

[29] 413 F.2d 1111 (7th Cir. 1969).

[30] United States v. Dickerson, 413 F.2d at 1117.

[31] *Id.* at 1113-14. *See also* Lipton, *supra* note 4, at 336.

[32] United States v. Dickerson, 413 F.2d at 1114.

[33] *Id.* at 1116.

of the opinion of the lower court which concerned the presence of certain coercive pressures which prompt cooperation from the taxpayer was quoted:

> It would seem to us that the average citizen, faced with repeated questioning by two government agents is in an ominous situation to say the least. The Government suggests that the defendant was in no way physically restrained, but we doubt that he really felt free to walk out on the investigators from the Internal Revenue Service. In the absence of sufficient warnings and the assistance of counsel, there are innumerable factors which act on the taxpayer's mind compelling him to 'co-operate' with the federal authorities.[34]

The crux of the *Dickerson* opinion was the rationale that in a criminal tax fraud investigation the combination of the taxpayer's ignorance of the criminal nature of the investigation and the inherent compulsion to cooperate with I.R.S. agents deprives the suspect of any opportunity to make an intelligent waiver of his fifth amendment rights.[35] "Incriminating statements elicited in reliance upon a taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so must be regarded as equally violative of constitutional protections as a custodial confession extracted without proper warning."[36]

The same conclusion was reached in *United States v. Turzynski*.[37] Ruling that a taxpayer has not voluntarily waived his fifth amendment privilege when he gives information to an I.R.S. agent conducting a criminal tax investigation, the court observed:

> To hold otherwise would lead to the anomolous conclusion that a person suspected of bank robbery, sale of narcotics, murder, rape or other serious crime is entitled to greater protection

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[34] *Id.*

[35] Lipton, in discussing the situation which faces the taxpayer suspect in a tax investigation, observed:

> First, there is always the fear of incurring a civil tax liability that hopefully might be avoided by cooperation. Also, a taxpayer may conclude that lack of cooperation will result in unwanted publicity about a tax liability. The average citizen, moreover, believes that the government prosecutes only the recalcitrant, uncooperative individual who is unwilling to pay what he owes. Who would believe the ironic truth that the cooperative taxpayer fares much worse than the individual who relies upon his constitutional rights! [Lipton, *supra* note 4, at 336.]

[36] United States v. Dickerson, 413 F.2d at 1116. *See also* Thomas v. United States, 386 U.S. 975 (1967), in which Mr. Justice Douglas, in his dissent from the Court's denial of certiorari, stated:

> I would grant this petition on the fourth question. It concerns the apparent practice of Internal Revenue Agents in examining taxpayers and using the evidence obtained in criminal prosecutions when the taxpayers are given no warning as to their rights, including the right to have an attorney present. This is not an in-custody use, but it is a coercive examination of a taxpayer at a critical preliminary hearing, so to speak, and the question presented apparently is a recurring one. [*Id.* at 975.]

[37] 268 F. Supp. 847 (N.D.Ill. 1967).

> of his constitutional rights than a person suspected of violating the internal revenue laws. For when the silent transition from civil to criminal investigation takes place in a tax case, the taxpayer being interrogated and asked to furnish his books and records is just as surely a prime suspect and candidate for criminal prosecution as the individual under interrogation as a suspect for other crimes.[38]

The court went on to state:

> Whether a suspect is induced to incriminate himself by a combination of ignorance of his rights and the coercive atmosphere of custody, or by ignorance of his rights combined with the inference that the purpose of the interrogation is simply to ascertain his dollars and cents liability for taxes, the result is the same, an involuntary self-incrimination. In some respects the tax investigation is more insidious and dishonest than the custodial interrogation, for the suspect in custody well knows his interrogators are seeking evidence to convict him of a crime while the tax suspect is permitted and even encouraged to believe that no criminal prosecution is in contemplation.[39]

A similar result was reached in a draft evasion case, *United States v. Casias.*[40] The court held that a conscientious objector, who had not reported to his assigned civilian job, should have been warned of his fifth amendment privilege when requested by his draft board to "drop by" and bring his notice of classification; the initiation of criminal prosecution depended upon whether the defendant had received the notice of classification. By arranging the meeting "the board was then engaged in obtaining an essential link in the course of forging a chain of evidence for use in his prosecution, [and] here we have a vital non-disclosure under circumstances which called for disclosure."[41]

In *Prudden,* the Fifth Circuit rejected *Dickerson's* interpretation of *Mathis* as spurious and the decision in general as "an unwarranted extension of the *Miranda* decision."[42] After an extensive discussion of *Miranda,* the court noted that the Fifth Circuit had "uniformly applied one concept—that *Miranda* warnings are not constitutionally required in tax investigation cases where the taxpayer is not deprived of his freedom and not actually compelled or coerced to furnish statements or documents."[43]

Rejecting the rationale that a non-custodial tax interrogation could produce a coercive atmosphere sufficient to warrant the *Miranda* warn-

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[38] *Id.* at 850-51.

[39] *Id.* at 851.

[40] 306 F. Supp. 166 (D. Colo. 1969).

[41] *Id.* at 168-69.

[42] United States v. Prudden, 424 F.2d at 1028.

[43] *Id.* at 1030. *See* Marcus v. United States, 422 F.2d 752 (5th Cir. 1970); United States v. Jernigan, 411 F.2d 471 (5th Cir. 1969), *cert. denied,* 396 U.S. 927 (1969); Agoranos v. United States, 409 F.2d 833 (5th Cir. 1969), *cert. denied,* 396 U.S. 824 (1969).

ings, Judge Clark said "actual or inherent compulsion"[44] was "a requisite to the invocation of the amendment's protection against self-incrimination."[45] Reviewing the facts in *Prudden*, the court found no actual or implied restraint or "in-custody interrogation or anything approaching comparable pressures."[46]

The court observed that the *Miranda* decision itself was careful to distinguish between the need for explicit warnings to protect the suspect in an in-custody interrogation and those interrogations conducted in his own home or office, where the suspect may be more cognizant of his rights and more "confident, indignant, or recalcitrant."[47] *Prudden* thus interprets *Miranda* as requiring "explicit warnings"[48] only when the facts show an "incommunicado interrogation . . . in a police-dominated atmosphere"[49] or circumstances which, due to a custodial interrogation atmosphere outside the station house, produce comparable compelling pressures.[50]

In *Prudden* the court acknowledged the proposition:

> [A]lthough Miranda factually encompassed only essentially in-custody interrogation, its underlying philosophy could apply to non-custodial questioning given the proper set of coercive circumstances, hence requiring full application of *Miranda* warnings.[51]

The court discussed two recent Fifth Circuit cases[52] in which the taxpayer was entitled to raise a Fifth Amendment self-incrimination objection because of the tax investigation had "become an inquiry with dominant criminal overtones."[53] The factor which changed the nature of the investigation was the presence of an Internal Revenue Service administrative summons[54] which, if enforced, would compel the taxpayer to incriminate himself. The court found that this element of compulsion was not present in the *Prudden* investigation.[55]

Judge Clark expressly rejected *Dickerson's* rationale that sufficient compulsion results when an individual is confronted with "govern-

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[44] United States v. Prudden, 424 F.2d at 1027.

[45] *Id.* at 1026.

[46] *Id.* at 1029.

[47] Miranda v. Arizona, 384 U.S. at 449-50, *quoting* O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1st ed. 1956).

[48] United States v. Squeri, 398 F.2d 785, 789 (1968).

[49] United States v. Prudden, 424 F.2d at 1029.

[50] *See* Orozco v. Texas, 394 U.S. 324 (1969).

[51] Andrews, *The Right to Counsel in Criminal Tax Investigations Under Escobedo and Miranda: The "Critical Stage,"* 53 IOWA L. REV. 1074, 1106-07 (1968). *See also* United States v. Lackey, 413 F.2d 655 (7th Cir. 1969).

[52] United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969); Stuart v. United States, 416 F.2d 459 (5th Cir. 1969).

[53] United States v. Prudden, 424 F.2d at 1031.

[54] *See* Lipton and Petrie, *Subpoena Powers of Internal Revenue Service*, Proceedings of the 13th Annual Tulane Tax Institute 108 (1964).

[55] United States v. Prudden, 424 F.2d at 1031.

mental authority in an adverse situation."[56] Requiring "every administrative official who confronts a citizen with a request for information that might disclose criminal conduct"[57] to give *Miranda* type warnings would "open a veritable Pandora's box."[58] Judge Clark observed:

> There are a thousand and one administrative inquiries routinely made every day in every city which could evoke responses that might form a part of the basis in proof for a charge of perjury, falsification of records, failure to file a report or perform a legal duty or other criminal conduct. Most of these routine administrative confrontations would be rendered ineffective to the citizen and his government by imposing *Miranda* requirements. If 'authority' were allowed to supplant custody—the deprivation of freedom—as the determinate of compulsion, even those routine field investigations which *Miranda* expressly exempted must fall.[59]

A similar observation on the disruptive effect of the *Miranda* warnings on everyday governmental administration was made in *Morgan v. United States*.[60] The court said:

> There must be reasonable limits to the solicitude required of the government. Defendant would have it appear that it would have been a simple matter to have informed him that he was entitled to counsel. This, however, is no easy solution to what, if the defendant is correct, is a very far reaching question. If the government were obliged to inform a defendant that he was entitled to counsel, presumably it would equally be obliged to supply one if he was financially disabled.
>
> In a *Miranda* situation there may be thought to be a very real need for counsel. But to say that a government agency must be prepared to suggest, and perhaps supply, counsel at every turn that it asks questions of someone, in addition to advising that there is no need to answer and warning of the possibility of self-incrimination, we think goes far beyond any principle of fundamental fairness, and would be an uncalled-for departure. To some extent persons must be prepared to look after themselves.[61]

Prudden suggests that the Supreme Court's decision in *Mathis* has no effect on the Fifth Court's holdings in cases presenting this issue. "*Mathis* in no way diminishes the necessity for showing actual or inherent compulsion to self-incrimination,"[62] but instead makes *Miranda* potentially applicable in any tax investigation, civil or criminal, where

[56] United States v. Dickerson, 413 F.2d at 1114.

[57] United States v. Prudden, 424 F.2d at 1028.

[58] *Id.*

[59] *Id.* The court noted that under the Dickerson reasoning a policeman could be required to give the Miranda warnings before asking to examine a driver's license. *See* United States v. Marlow, 423 F.2d 1064 (5th Cir. 1970).

[60] 377 F.2d 507 (1st Cir. 1967).

[61] *Id.* at 508.

[62] United States v. Prudden, 424 F.2d at 1027.

evidence of compulsion is present. Therefore, the court held that *Dickerson's* distinction between the civil and the criminal tax investigation was fallacious in light of *Mathis* which "did not recognize any distinction between the regular and special agent, the compulsive effect of the agents' official status . . . [being] identical."[63] However, a different view of the significance of *Mathis* is held by one commentator who observed:

> *Mathis* merely holds that a defendant is 'in custody' regardless of the circumstances which brought about the confinement. *Miranda* did not purport to determine the extent of the constitutional protection that exists prior to an arrest, and *Mathis* did not require the Court to decide whether the *Miranda* safeguards should be extended to pre-custodial interrogations.[64]

The *Prudden* decision is limited as precedent in criminal tax investigation cases because the Internal Revenue Service, since 1968, has required that the taxpayer be given essentially the same warnings as required by *Miranda* on first contact by a special agent.[65] In *United States v. Heffner*,[66] the Fourth Circuit held that the I.R.S., having established the policy, must comply with it. However, this issue was not decided in *Prudden* which held only that the 1968 Internal Revenue Service regulation had no effect on the constitutional rights of taxpayers in investigations conducted before its promulgation.[67]

Criminal tax investigation cases are particularly suitable for the *Escobedo* "accusatory stage" argument because the "stage" is clearly reached at the point when the case is transferred to the Intelligence Division and the "criminal investigative machinery of the federal government has become directed at, and in contact with, the taxpayer in the accusatory sense."[68] Added to this proposition are the contentions that a criminal tax investigation is inherently coercive by nature and that only when the suspect is "aware not only of the privilege but also of the consequences of foregoing it . . . that there can be any assurance of real understanding and intelligent exercise of the privilege."[69]

However, as *Prudden* clearly indicates, the Fifth Circuit will continue to construe *Miranda* strictly and require the *Miranda* warnings only when there is a custodial detention or a situation in which com-

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[63] *Id.* at 1028-29.

[64] Lipton, *supra* note 4, at 338.

[65] I.R.S. News Release IR-949, Nov. 26, 1968 (CCH 1969 STAND. FED. TAX REP. ¶6358), which provides:

> At the initial meeting with the taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek assistance of an attorney before responding.

[66] 420 F.2d 809 (4th Cir. 1969).

[67] United States v. Prudden, 424 F.2d at 1030.

[68] Andrews, *supra* note 51, at 1112.

[69] Comment, *supra* note 24, at 869.

parable compelling pressures are produced. A clear explanation of the theory behind the Fifth Circuit's narrow construction of *Miranda* is provided in Judge Fairchild's dissent in *Dickerson*:

> The *Miranda* equation is that official questioning of one who is in custody or deprived of his freedom of action in any significant way equals compulsion to answer unless the Miranda warnings or other effective means are used to insure absence of compulsion.
>
> It is the compulsion to answer which offends against the fifth amendment provision that no person shall be compelled in any criminal case to be a witness against himself.[70]

Henderson S. Hall

Insurance—Determination of Legal Entitlement Under Uninsured Motorist Endorsement

The introduction, in 1954,[1] of the uninsured motorist endorsement to automobile liability insurance policies was designed to alleviate the short-comings of financial responsibility laws.[2] It was accompanied, however, by a plethora of legal questions and problems, not the least of which was how to determine legal entitlement under the policy. Though many of the questions have been answered and many of the problems resolved, the question of legal entitlement has become increasingly significant. In 1962 only five states had enacted mandatory uninsured motorist statutes,[3] but by 1967 the number had grown to forty,[4] making the problem one of national significance. The problem became one of concern to Mississippi motorists on January 1, 1967, when the uninsured motorist law became effective in Mississippi.[5]

The language of the endorsement with regard to determination of liability and damages, i.e., legal entitlements, is, in part:

> Provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.[6]

Therefore, when an insured is injured as the result of the "ownership, maintenance or use"[7] of an uninsured automobile, he has two options available to him under the terms of the endorsement: settlement with

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[70] United States v. Dickerson, 413 F.2d at 1118 (dissenting opinion).

[1] Donaldson, *Uninsured Motorist Coverage*, 34 Ins. Counsel J. 57 (1967).

[2] *See, e.g.*, Miss. Code Ann. § 8285-05 (Supp. 1968).

[3] Ames, *The Automobile Accident Commission Proposal: An Irrational Concept*, 14 U. Fla. L. Rev. 398, 433 (1962).

[4] Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 Nw. U. L. Rev. 497, 499 (1967).

[5] Miss. Code Ann. § 8285-51 (Supp. 1968).

[6] Donaldson, *supra* note 1, at 63.

[7] *Id.* at 58.

the company or arbitration. Practically speaking, either option depends on the mutual agreement of the parties.

Settlement with the insurance company is the most expedient way to determine legal entitlement and recover damages due to injury. This procedure, however, entails agreement between the insured and the insurance company as to fault, damage, and liability. Although settlement is perhaps the most common method of determining legal entitlement, the parties do not always agree and consequently must sometimes seek other means to decide the issue.

The endorsement provides that the issue will be arbitrated when the parties fail to agree. Mississippi and other states which follow the common law rule, however, will not enforce an agreement to arbitrate future disputes. In fact, the Mississippi legislature has specifically provided that the agreement to arbitrate found in the uninsured motorist endorsement shall not be binding.[8] Consequently, even arbitration requires a harmonious relationship between the insured and the insurance company. In effect, the parties must agree to arbitrate after failing to agree on a settlement. Given the basic distrust lawyers have for arbitration[9] and the animosity generally arising from a failure to settle, arbitration seems an unlikely possibility.

If the parties can agree neither to settle nor to arbitrate, the insured must resort to means not provided for in the policy. He could settle with the uninsured motorist, but the likelihood of this being an appropriate course of action by the insured seems remote. Generally, the uninsured motorist is financially irresponsible, and a settlement with him is of no great value to the insured. In addition, the insurance company, according to terms of the policy upheld by judicial decisions, is in no way bound by such a determination of liability; and, in fact, the settlement may preclude the insured from receiving the benefits of the uninsured motorist coverage.[10] Therefore, litigation seems to be the only effective recourse for the insured outside the terms of the endorsement.

The litigation may proceed in three possible forms. The insured theoretically could: (1) sue the uninsured motorist, (2) sue the insurance company directly, or (3) join the uninsured motorist and the insurance company as defendants. None of these possibilities, however, is without its difficulties. The language of the endorsement, for example, which undermines the efficacy of settlement with the uninsured also proscribes a suit brought to judgment against the uninsured. This language has been upheld by the courts.[11]

The requirement that the insured have the company's permission to sue, however, has fallen into disfavor:

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[8] MISS. CODE ANN. § 8285-55 (Supp. 1968).

[9] King, *Arbitration of Automobile Accident Claims*, 14 U. FLA. L. REV. 328 (1962).

[10] *See, e.g.*, 1966 Standard Form, Part I: Exclusions; Portillo v. Farmers Ins. Exch., 238 Cal. App. 2d 58, 47 Cal. Rptr. 450 (1965); Cotton States Mut. Ins. Co. v. Torrance, 110 Ga. App. 4, 137 S.E.2d 551 (1964); Kisling v. M.F.A. Mut. Ins. Co., 399 S.W.2d 245 (Mo. App. 1966).

[11] *See* cases cited note 10 *supra*.

> In 1963, the permission to sue clause was eliminated from the standard form, and replaced with a clause stating that 'no judgment against any person or organization . . . shall be conclusive, as between the insured and the company, of the issues of liability . . . or the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to action prosecuted . . . with the written consent of the company.'[12]

The question remains, then, whether suit against the uninsured has any effect on the determination of legal entitlement between the insured and the insurance company. Obviously, if the provision of the endorsement were applied literally, the insurance company would in no way be bound by a judgment against the uninsured motorist without express written consent.

The weight of authority would seem, however, to indicate that judgment against the uninsured is binding against the insurance company.[13] In the instances where the judgment has been held to be binding, the insurance company generally has had the opportunity to present its case but has chosen to rely on the terms of the policy.[14] In *Allstate Insurance Company v. Pietrosh*[15] the court recognized the true antipreclusion purpose of the endorsement and added:

> The provision is reasonable when the insurance company is not notified of the litigation and is, therefore, without compulsion to intervene, demand arbitration, or take other steps. Its enforcement may be appropriate in a case where the insured secures a default judgment against the uninsured motorist, since an adversary determination of liability and damages is absent.[16]

The American Law Institute in its *Restatement of the Law of Judgments* seems to have had the same principle of actual adversary litigation in mind when it provided, "A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."[17] Since the liability of the uninsured would be based on tort law and that of the insurance company in contract, the *Restatement* provision[18] appears to be directly in point. In *Preclusion/Res Judicata Variables: Parties* Professor Vestal asserts:

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[12] Widiss, *supra* note 4, at 553, *quoting* 1963 Standard Form Uninsured Motorist Endorsement, Part I.

[13] Logan v. Aetna Cas. & Sur. Co., 309 F. Supp. 402 (S.D. Miss. 1970); M.F.A. Mut. Ins. Co. v. Lovins, 248 F. Supp. 108 (E.D. Ark. 1965); Matthews v. Allstate Ins. Co., 194 F. Supp. 459 (E.D. Va. 1961); State *ex rel* State Farm Mut. Auto. Ins. Co. v. Craig, 364 S.W.2d 343 (Mo. App. 1963); Boughton v. Farmers Ins. Exch., 354 P.2d 1085 (Okla. 1960).

[14] *See* cases cited note 13 *supra*.

[15] 454 P.2d 106 (Nev. 1969).

[16] *Id.* at 111.

[17] RESTATEMENT OF JUDGMENTS § 68(2) (1942).

[18] *Id.*

> It would seem to be entirely reasonable to allow preclusion against non-parties to [the first action] so long as they are adequately represented and protected in that suit. At this point there would seem to be a weighing process involved. Considered should be the saving of time of the court, the adequacy of protection extended, and other relevant variable factors.[19]

An important consideration in a suit by the insured against the uninsured, if it is intended to be binding against the insurer, is the degree of participating allowed the insurer. The American Law Institute, for example, provides:

> The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have the opportunity to litigate, between themselves.[20]

The court in *Pietrosh*,[21] considering this point in its decision that the judgment against the uninsured was binding against the insurer, said:

> We recognize that our holding on this point subverts the requirement of privity normally present with an application of the doctrines of res judicata or collateral estoppel. . . . Our holding also forces intervention. However, the avoidance of multiple litigation carries the greater weight.[22]

The natural conclusion drawn by the court in *Pietrosh*[23] is that in order for a judgment against the uninsured to be binding as against the insurer, intervention or the right to intervene must exist.[24] The right to intervene was unknown to common law and is generally recognized as a purely statutory right, governed by the limitations of the statute granting the right.[25]

The Federal Rules of Civil Procedure provide for the right to intervene[26] but make that right dependent not only on the condition that the intervenor "would or might be bound by a judgment in the action,"[27] but also that his interest "is or may be inadequately represented."[28] "[E]ven if the applicant might be bound by the judgment,

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[19] 50 Iowa L. Rev. 27 at 75 (1964).

[20] Restatement of Judgments § 82 (1942).

[21] 454 P.2d 106 (Nev. 1969).

[22] *Id.* at 111.

[23] *Id.*

[24] Intervention has been defined as:

> [T]he proceeding by which one not originally a party to an action is permitted, on his own application, to appear therein and join one of the original parties in maintaining the action or defense, or to assert a claim or defense against some or all of the parties to the proceeding as originally instituted. [39 Am. Jur. *Parties* § 56 (1942)].

[25] 39 Am. Jur. *Parties* § 56 (1942).

[26] Fed. R. Civ. P. 24.

[27] Glens Falls Ins. Co. v. Cook Bros., 23 F.R.D. 269, 271 (S.D. Ind. 1959).

[28] *Id.*

he cannot intervene as of right if he is in fact adequately represented by the existing parties to the action."[29]

Many states have made specific provisions for the right to intervene in cases where the insured relies on the uninsured motorist coverage. Virginia, for example, provides that the insured in such a case serve a copy of process on the company, and that the insurance company shall then have the right to act in the name of the uninsured, provided that the latter may employ counsel of his own choice if he so chooses.[30] Such a provision, it would seem, substantially insures that the insurance company's interest will be adequately represented, either by the company itself, or by the uninsured motorist.

Another procedure which results in having the same party-litigants, and, consequently, would appear to have the same binding effect, is joinder of the insurance company and the uninsured. But even here there are obstacles. The Federal Rules of Civil Procedure provide:

> All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.[31]

Twenty-four states have permissive joinder statutes similar to this rule, and fifteen states have statutes which would probably allow joinder of the insurance company and the uninsured motorist. Mississippi belongs to neither group.[32] The possibility of joinder has, however, not been expressly excluded in Mississippi.

Mississippi courts have ruled that joinder of a cause of action ex delicto and a cause of action ex contractu constitutes a demurrable misjoinder,[33] but joinder in this instance seems unlikely to fall within the ambit of those decisions. The cause of action against the insurance company is not breach of contract but is, in essence, one to determine tort liability of the uninsured by which the company will be bound. Thus, even though the insurance company's obligation to the insured is purely contractual, the suit remains one based on tort. An argument in favor of joinder is that:

> The insurance company should be protected so that a litigation has no preclusion effect upon the company unless it has been afforded a complete opportunity to protect its interests and so that its rights against the uninsured motorist are not prejudiced by actions of the insured.[34]

It is suggested that when the company is made a co-defendant in the

[29] *Id.*

[30] VA. CODE ANN. § 38.1-381 (e) (1) (1970).

[31] FED. R. CIV. P. 20 (a).

[32] Widiss, *supra* note 4, at 556.

[33] Stringer v. Consumers Credit Corp., 234 Miss. 240, 105 So. 2d 756 (1958); Town of Hazelhurst v. Cumberland Tel. & Tel. Co., 83 Miss. 303, 35 So. 951 (1903).

[34] Widiss, *supra* note 4, at 557.

suit, it is assured that its rights will not be prejudiced without a full opportunity to defend its interests.[35]

In opposition to such a proceeding, insurance companies have argued that the action as against them is premature because the insured has not yet established the legal liability of the uninsured motorist.[36] In refuting this argument courts have held that such assertion "would in effect convert the 'legally liable' policy to an unsatisfied judgment policy and would promote the multiplicity of suits."[37] In addition, as pointed out above, the suit is one not for breach of contract, but for determination of contractual obligations.

A basic complaint that must be levied against either intervention or joinder is that it defeats the purpose of the uninsured motorist coverage. Instead of affording the insured "the same protection against death or injuries at the hands of an uninsured motorist as [he] would have had if that motorist had obtained for himself the minimum insurance coverage"[38] as required by safety responsibility acts, the insurance company, in effect (by offering the uninsured motorist a defense against the insured), becomes the liability insurer for the uninsured motorist.[39] And the insured has paid for that defense. Regarding this arrangement, the court in *Holt v. Bell*[40] said, "When the parties are placed in a position where the interest of an insurer is to defeat the claim of its own insured, the position of the parties is such that the court cannot countenance the situation."[41]

In addition, both intervention and joinder create a special problem when the uninsured is not content merely to let the insurance company provide him a defense, but chooses to counterclaim. Here a conflict of interest arises when the insurance company, "having to defend the insured against charges of negligence, in the same proceeding [asserts] negligence on the part of its insured in its defense under the uninsured motorist clause."[42]

In the event of a counterclaim it seems inevitable, in jurisdictions like Mississippi where contributory negligence is denied as an absolute defense and is no bar to recovery,[43] that the insurance company will be liable to pay one or both of the parties. No right to intervene should allow the company to defend the uninsured motorist, since that position will be adequately represented by the uninsured himself. It would appear, then, in this context, that intervention statutes like Virginia's are perhaps too broad as a result of failure to make provision for

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[35] *Id.*

[36] State *ex rel.* State Farm Mut. Auto. Ins. Co. v. Craig, 364 S.W.2d 343 (Mo. App. 1963).

[37] *Id.* at 347.

[38] Comment, *Uninsured Motorist Coverage—A Suggested Approach to Consistency*, 23 ARK. L. REV. 167, 185 (1969).

[39] M.F.A. Mut. Ins. Co. v. Bradshaw, 245 Ark. 95, 431 S.W.2d 252 (1968).

[40] 392 P.2d 361 (Okla. 1964).

[41] *Id.* at 363.

[42] M.F.A. Mut. Ins. Co. v. Lovins, 248 F. Supp. 108, 114 (E.D. Ark. 1965).

[43] MISS. CODE ANN. § 1454 (1942).

counterclaims.[44] In such a case the insurance company would have little or no alternative. It could not sit idly by, await the final judgment, and pay the party for whom the judgment was granted; for to do so would increase the company's potential liability beyond the limits of the policy in case the uninsured motorist should prevail.[45] Barring a jury finding of equal fault on the part of both insured and uninsured, the insurance company will have a duty to pay. Given the likely duty of payment, the insurance company could act in accordance with the insurance policy's liability provision to defend the insured against the counterclaim without aiding the prosecution of the insured's affirmative claim. Even that course of action seems remote, since the elements of the insured's defense will generally constitute elements in his affirmative claim.

In the light of the myriad problems involved in a suit against the uninsured motorist resulting from intervention, joinder, or counterclaim, another course of action may appear more appealing to the insured, i. e., direct suit against the insurance company based on contractual obligations. Direct action against the insurance company has the advantage of simplicity.[46] Not only is the main issue concerning the insured more quickly reached, but direct action also eliminates the conflict of interest inherent in suit against the uninsured when a counterclaim is involved. Direct action also precludes the insurance company from acting as the uninsured's liability insurer. Some courts in jurisdictions which will not enforce the endorsement's agreement to arbitrate look very favorably on direct action.[47] The court in *Wortman v. Safeco Insurance Company*,[48] for example, reasoned:

> [S]ince the insured cannot be made to arbitrate, and the contract suggests that the intention of the parties is to determine the issues between themselves, it appears . . . that the intentions of the parties will best be served by an action in a court of law by the insured against the insurer; the court, in effect, becomes the arbitrator.[49]

In addition, it seems that direct action against the insurance company has one beneficial characteristic attributed to arbitration, i. e., leaving the legal status of the uninsured motorist's liability unaffected.[50] Furthermore direct action seems all the more logical since the insured and his insurance company are, in effect, adversaries when they fail to agree to a settlement.

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[44] VA. CODE ANN. § 38.1-381 (e) (1) (1970).

[45] Travelers Indem. Co. v. East, No. 45,905 (Miss., Oct. 19, 1970); Southern Farm Bureau Cas. Ins. Co. v. Logan, 238 Miss. 580, 119 So. 2d 268 (1960); United States Fidelity & Guar. Co. v. Cook, 181 Miss. 619, 179 So. 551 (1938).

[46] M.F.A. Mut. Ins. Co. v. Lovins, 248 F. Supp. 108 (E.D. Ark. 1965).

[47] *See, e.g.*, Hickey v. Ins. Co., 239 F. Supp. 109 (E.D. Tenn. 1965); Wortman v. Safeco Ins. Co., 227 F. Supp. 468 (E.D. Ark. 1963).

[48] 227 F. Supp. 468 (E.D. Ark. 1963).

[49] *Id.* at 471.

[50] Fieting, *Arbitration Under the Uninsured Motorists Coverage*, 28 INS. COUNSEL J. 629 (1961).

Unfortunately, in *Logan v. Aetna Casualty & Surety Company*,[51] a federal case interpreting Mississippi law, the possibility of direct action in Mississippi was rejected.[52] The court specifically rejected those decisions of other jurisdictions most favorable to direct action.[53] In refusing to approve direct action the court said:

> By far the strongest argument against allowing . . . direct action by the insured in which the uninsured motorist is not a party and thus not bound by any determination of this Court concerning his legal liability is the possibility of the trier of fact in a subsequent subrogation suit by the insurer reaching an entirely different conclusion as to the legal liability of the uninsured motorist or the amount of damages for which he is liable. . . . The question of the legal liability of the uninsured motorist should not be subject to possible conflicting determinations in two separate suits, particularly when such a procedure is not only unnecessary but could in fact prejudice the rights of both parties.[54]

The rationale of the *Logan* decision is by no means convincing. The strongest argument against direct action is reduced to a possibility of disparity in determination of liability, but this possibility exists even when the insurance company and the insured agree to settle. Upon settlement with its insured an insurance company has the same rights against the operator of the uninsured vehicle as its insured had.[55] In a subsequent subrogation suit there is no guarantee that the trier of fact will determine the uninsured motorist's liability to be the same as the settlement amount. There must, therefore, be more than the possibility of disparity to lead the court to reject direct action. In fact, the court intimated other grounds when it said that courts should "strive, whenever possible, to prevent a multiplicity of suits to determine the same issue especially when the possibility of different results under such procedure would prejudice the rights of either party."[56] It seems, then, that prevention of multiplicity of suits is the compelling argument against allowing direct action against the insured.

Though there is no real argument against avoiding multiplicity of suits, consideration of the alternatives should be given weight to decide whether the avoidance is really so desirable. The court in *Logan* says there is nothing to prevent the insured from suing the uninsured motorist and having that judgment bind the insurer.[57] But if such action is to be taken merely to avoid multiplicity of suit, consideration of those problems inherent to action against the uninsured motorist should be given full weight. Difficulty and desirability of intervention, the relative positions of the parties vis-a-vis one another, and the very purpose of the uninsured motorist law must be considered. If a com-

[51] 309 F. Supp. 402 (S.D. Miss. 1970).

[52] *Id.*

[53] *Id.* at 405.

[54] *Id.*

[55] Vaught v. State Farm Fire & Cas. Co., 413 F.2d 539 (8th Cir. 1969).

[56] Logan v. Aetna Cas. & Sur. Co., 309 F. Supp. 402, 407 (S.D. Miss. 1970).

[57] 309 F. Supp. 402 (S.D. Miss. 1970).

parison were made between disadvantages of multiplicity of suit and the disadvantages of suit against the uninsured motorist, it seems certain that multiplicity of suit would be the lesser evil, and direct action against the insurer would be preferred.

Regardless of how cogent or jejune the *Logan* decision may be, it is nevertheless authority against direct action by the insured against his insurer. Therefore, the potential difficulties that await the insured who desires to collect under the uninsured motorist coverage of his automobile liability policy act to coerce him to accept whatever the insurance company offers. Should the insured find settlement totally unacceptable, however, the law as it is now interpreted requires that the insured bring suit against the uninsured motorist. Bringing that suit virtually requires the insurance company to provide the uninsured motorist with assistance in defending against the insured's claim. Of necessity that defense will not be confined to protecting the insurance company's liability within the policy limits. The insured, who sought additional protection for himself and his family, has, in effect, paid the liability insurance premiums for the uninsured and has derived little personal benefit.

Unless the courts subsequently reject the *Logan* rationale and allow direct action against the insurance company, alleviation of the present inequities will be a matter of legislative concern. The most direct solution would be for the legislature to specifically provide for the right to direct action against the insurance company in a suit based on uninsured motorist coverage, thereby affording the insured motorist the best possible means of determining legal entitlement outside the terms of the policy. If such a solution should seem too radical for the legislature, the problems for the insured could be at least partially remedied by adoption of an intervention statute, based on the Federal Rules of Civil Procedure, allowing intervention only when the company's interest may not be adequately represented. At the same time the judgment against the uninsured could be made binding on the company.

It should be clear that the present state of the law as it is being interpreted works the greatest hardship on the insured motorist trying to use the coverage he has paid for. At the same time present requirements work to the advantage of the uninsured motorist. The law should be changed.

Graham G. Boyd

EDITORS NOTE: In *Harthcock v. State Farm Mutual Automobile Insurance Company*, #46,040 (Miss. Feb. 1, 1971), the Mississippi Supreme Court held that under the uninsured motorist provision, an insured may establish the negligence of the uninsured motorist in a direct action in contract against the insurer.

Property—Adverse Possession Between Cotenants: The Requirement of Actual Notice

I. Introduction

The recent case of *Quates v. Griffin*[1] is representative of a type of dispute often litigated in this state—the claim of a cotenant, or a grantee of a contenant, to have acquired sole title to the common property by adverse possession. Because of the characteristics of a tenancy in common and the nature of the relationship between cotenants, such a claim presents problems not encountered when an adverse assertion is directed at a sole owner.[2]

A tenancy in common is a form of co-ownership of property in which each cotenant has a separate, distinct interest but all have a common right to possession subject only to the equal right of each of the other cotenants.[3] Because each has the right to possess the entire estate, the fact that one cotenant is in exclusive possession is not in itself an indication that the occupant has repudiated the cotenancy,[4] it being "well established that possession which in ordinary cases would constitute adverse possession is not sufficient where entry was made as a tenant-in-common."[5] Even though the occupying cotenant grazes his cattle on the land, cuts the timber, improves the pastures, pays the taxes, repairs buildings, constructs ponds, and maintains tenants on the property, his acts are not inconsistent with a cotenancy.[6] The cotenants out of possession can assume such acts of dominion to be the acts of all the cotenants until this dominion is coupled with an intention on the part of the occupant to repudiate the cotenancy, and the other cotenants have actual notice of this intention.[7] With such notice, the cotenants out of possession can no longer regard the occupant's possession as being subject to their interests; it amounts to an ouster of the other cotenants and is adverse to them.[8] This adverse possession, if maintained for the statutory period, vests sole title to the property in the adverse claimant.[9]

While the general rule that cotenants out of possession cannot be ousted from the common property without actual notice of the adverse claim of their cotenant is easily stated, the difficulty faced by the courts is deciding in what factual context the requirement is met. The opinions of the Mississippi Supreme Court in cases on this point have sometimes been confusing and contradictory, as the court itself acknowledges in *Quates*.[10] Noting the need for "stability, predictability and simplicity

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[1] 239 So. 2d 803 (Miss. 1970).

[2] 3 Am. Jur. 2d *Adverse Possession* § 174 (1962).

[3] C. Moynihan, Introduction to the Law of Real Property 223 (1962).

[4] 3 Am. Jur. 2d *Adverse Possession* § 173 (1962).

[5] Anderson v. Boyd, 229 Miss. 596, 610, 91 So. 2d 537, 542 (1956).

[6] Quates v. Griffin, 239 So. 2d at 810; *cf.* Stampley v. Green, 251 Miss. 47, 168 So. 2d 300 (1964).

[7] Nichols v. Gaddis & McLaurin, Inc., 222 Miss. 207, 231, 75 So. 2d 625, 633 (1954).

[8] *Id.* at 222, 75 So. 2d at 629.

[9] Miss. Code Ann. § 711 (1956).

[10] Quates v. Griffin, 239 So. 2d at 811.

in the law involving land titles,"[11] the court, in deciding *Quates*, overrule the landmark case of *Nichols v. Gaddis & McLaurin, Inc.*,[12] to the extent that *Nichols* had overruled *Peeples v. Boykin*,[13] and announced the new rule on ouster of cotenants:

> Where one or more of several cotenants convey land by an instrument purporting to vest in the grantee the fee simple title to the entire property, and the grantee is not a cotenant at the time of the execution of the deed, and the grantee records his deed in the county where the land lies, and enters into possession asserting open and exclusive ownership thereof, the cotenants not participating in the conveyance are deemed to be ousted and on the termination of the statutory period, title by adverse possession becomes vested in the grantee.[14]

The purpose of this note will be to examine the *Quates* decision in light of the previous case law on the subject and to consider whether the rule announced in *Quates* necessitated the overruling of *Nichols* when the latter case is read in conjunction with the new rule. Since the *Quates* rule incorporates the requirement of a recorded fee simple deed as an element necessary to oust the non-participating cotenants, this note will concentrate on those cases in Mississippi involving a deed as the basis for the claim of an ouster by the adverse claimant.

II. Adverse Possession Between Avowed Cotenants

It is important to note the distinction between those cases involving claims of adverse possession between avowed cotenants and those involving a stranger-grantee of a cotenant who, regardless of his status after the conveyance, was not a cotenant in the property before the conveyance.

The claims between avowed cotenants involving deeds arise in several different factual contexts. These include efforts to convey the common property from one or more cotenants to another of their cotenants by a deed purporting to cover the entire estate,[15] or the purchase by a cotenant of the common property at a tax sale[16] or at a foreclosure sale.[17] In the controversial case of *Peeples v. Boykin*,[18] the owner of the property involved had died intestate leaving two children by her first marriage and three by her second. Approximately five years after the mother's death, two of the children by the second marriage conveyed an undivided two-thirds interest in the land to the third child, the deed reciting that the three parties were the sole heirs of the former owner. The grantee-cotenant recorded this deed and possessed the

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[11] *Id.*

[12] 222 Miss. 207, 75 So. 2d 625 (1954).

[13] 132 Miss. 359, 96 So. 177 (1923).

[14] Quates v. Griffin, 239 So. 2d at 811.

[15] Peeples v. Boykin, 132 Miss. 359, 96 So. 177 (1923).

[16] Gavin v. Hosey, 230 So. 2d 570 (Miss. 1970); Howard v. Wactor, 41 So. 2d 259 (Miss. 1949); Cohea v. Hemingway, 71 Miss. 22, 14 So. 734 (1893).

[17] Wyatt v. Wyatt, 81 Miss. 219, 32 So. 317 (1902).

[18] 132 Miss. 359, 96 So. 177 (1923).

land continuously for well over ten years. When a suit for partition was brought by one of the cotenants not participating in the deed, the grantee-cotenant asserted that full title to the property had vested in her by reason of her adverse possession of the land under the recorded deed for the statutory period, and her title was confirmed by the chancellor.

The Mississippi Supreme Court, while stating that the rule in Mississippi was that a tenant in common could not "acquire title by adverse possession against his cotenants until they have actual notice of the adverse claim or knowledge of such facts as are tantamount thereto,"[19] held that "the placing of the deed of record gives notice to the world of the contents of the deed,"[20] and was such a wrongful ouster of the non-participating cotenants as "to warrant the institution of an ejectment suit against the tenant in occupancy. . . ."[21]

Obviously, while *Peeples* paid lip service to the general rule, it established an extremely liberal definition of actual notice or the equivalent thereof. The effect of the decision was that an occupying cotenant by recording a fee simple deed of the property to himself could thereby oust his cotenants and, by merely continuing in his hithertofore peaceful sole possession for the statutory period,[22] acquire a full title.

The reaction to *Peeples* was one of criticism.[23] In the thirty-one years between *Peeples* and *Nichols v. Gaddis & McLaurin, Inc.*,[24] no decision can be found which applied the *Peeples* concept of notice. In *McDonald v. Roberson*[25] a father had executed a deed to certain property to one of his children. The deed was invalid because it was testamentary in nature, but the grantee had occupied the land under the deed after her father died. When other heirs of the deceased grantor attempted to confirm their undivided interests in the land after natural gas was discovered on it, the court held that the possession of the daughter and her heirs had vested full title in them. The court mentioned *Peeples* only in stating that it had not based its decision on that case but on the fact that the cotenants out of possession had actual knowledge of the existence of the deed and the adverse claims under it.[26]

In *Nichols v. Gaddis & McLaurin, Inc.*,[27] a cotenant of a one

[19] *Id.* at 369, 96 So. at 178.

[20] *Id.*

[21] *Id.*, 96 So. at 178-79.

[22] Ten years in Mississippi. MISS. CODE ANN. § 711 (1956).

[23] McDonald v. Roberson, 204 Miss. 737, 38 So. 2d 189 (1948). *See generally* Note, *Adverse Possession of a Cotenant Against a Cotenant in Mississippi*, 21 MISS. L.J. 147 (1949).

[24] 222 Miss. 207, 75 So. 2d 625 (1954).

[25] 204 Miss. 737, 38 So. 2d 189 (1948).

[26] *Id.* at 757, 38 So. 2d at 190-91.

[27] 222 Miss. 207, 75 So. 2d 625 (1954). *Nichols* was appealed two more times after the original 1954 decision: Nichols v. Gaddis & McLaurin, Inc., 228 Miss. 1, 87 So. 2d 673 (1956); Gaddis & McLaurin, Inc. v. Nichols, 234 Miss. 155, 105 So. 2d 459 (1958). This trilogy of opinions illustrates the complicated factual situations in which the

hundred acre tract of land executed a deed of trust purporting to convey the fee to the entire property under a warranty of title. The land was conveyed to Gaddis and McLaurin in 1932 under a trustee's foreclosure deed which, however, was void because of an invalid trustee substitution. In 1933 Gaddis and McLaurin told one of the cotenants, an heir of the grantor of the deed of trust who farmed the land and lived adjacent to it, that they had bought the land, and they leased the property to him. This cotenant paid rent on the tract from 1932 until 1951. In 1952 a dispute arose over the rent. Gaddis and McLaurin leased the land to a new tenant in 1953.

Subsequently, Gaddis and McLaurin brought a suit to restrain the cotenant, their former tenant, from running his cattle over the land. They then amended their bill to make the other cotenants defendants and sought to confirm their title to all of the property.

This action was successful before the chancellor. The Mississippi Supreme Court held that Gaddis and McLaurin had established their title against those cotenants who had actual notice of Gaddis and McLaurin's adverse claims, but it reversed the chancellor's findings as to the other cotenants who lived away from the land in question and had no such actual notice. When Gaddis and McLaurin attempted to rely on *Peeples*, asserting that their recorded deed was notice to all the cotenants, the court said:

> Peeples v. Boykin was incorrectly decided. We do not think that the mere recording of a fee simple deed by a cotenant 'imparts notice' to other cotenants of an adverse claim to land by the grantee-cotenant, and do not think that 'this is as effectual for setting the statute in motion as actual notice would have been,' as was held in Peeples. This ignores the nature of the relationship of tenants in common, and the fact that a tenant in common out of possession is entitled to assume that a cotenant in possession holds for all cotenants, until he is given knowledge to the contrary, or the equivalent thereof. . . .[28]

The court then stated:

> The rule consistent with reason, precedent, and sound morals is that stated in 1 Am. Jur., Adverse Possession, Sec. 56.1 (1954 Supp.): 'Conceivably, a court may hold a tenant in sole possession of land may be merely recording a deed thereof purporting to convey full title to himself give notice to his cotenants of a purpose, otherwise secret, to hold the premises exclusively, but no decision unmistakably to that effect has been found. . . . The general conclusion which seems most consistent with the cases as a whole is that the mere record of a deed purporting to convey the entire property in land to a tenant in possession is not, as matter of law, notice to cotenants of the adverse

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courts seek to apply the general rule concerning notice. Gaddis and McLaurin eventually had their title to all the property confirmed upon the basis of MISS. CODE ANN. § 718 (1956).

[28] Nichols v. Gaddis & McLaurin, Inc., 222 Miss. at 231, 75 So. 2d at 633.

> character of the grantee's possession; although it is true that such record taken together with significant circumstances attending the grantee's possession may justify, and in some instances may require, a finding of notice. While, according to the view generally adopted, the record of a deed to an avowed cotenant in possession is notice to the other cotenants of the existence of the deed, such record is not . . . in itself notice that the grantee is claiming adversely under the deed and not as a cotenant.'[29]

The court stated that it was adopting these principles even though the possession of the cotenant was not for himself but as a tenant of Gaddis and McLaurin who were claiming under the trustee's foreclosure deed.[30]

Although the dispute was between cotenants out of possession and a stranger-grantee, the standard of notice required by the court before the cotenants could be ousted, was that imposed when the dispute is entirely between avowed cotenants. Generally the standard to be met when a deed to the entire property is executed to a stranger in Mississippi is less than that imposed on an avowed cotenant asserting an ouster.[31] Justice Lee, dissenting in *Nichols*, felt that this lesser burden should have been imposed on Gaddis and McLaurin. He was unable "to distinguish any difference between their situation"[32] and that of the parties in *Eastman, Gardiner & Company v. Hinton*.[33] The majority noted *Eastman* but determined it inapplicable since the stranger-grantee in that case had made an actual, physical entry onto the land.[34] In *Nichols* the court correctly sought some factual indication of a visible change in the character of possession of the land which would charge the cotenants out of possession with notice that they could no longer assume the possession of their cotenant to be subordinate to their interests. No such indication existed because "[t]he same cotenant continued in possession after the foreclosure as before, but as tenant . . ."[35] of Gaddis and McLaurin. The only thing that could be construed as notice was the recorded deed, and the court noted that none of the cases which cited *Peeples* had ever relied on a recorded deed *alone* as being notice of an adverse claim against cotenants.[36] The court emphasized its repudiation of the *Peeples* concept of notice by stating:

> As was said in Hulvey v. Hulvey, 92 Va. 182, 23 S.E. 233

[29] *Id.* at 231-32, 75 So. 2d at 634.

[30] *Id.* at 232, 75 So. 2d at 634.

[31] Reed v. Bales, 240 Miss. 592, 128 So. 2d 374 (1961); Huddleston v. Peel, 238 Miss. 798, 119 So. 2d 921 (1960); Avera v. Turner Lumber Co., 230 Miss. 123, 92 So. 2d 458 (1957); Davis v. Gulf Refining Co., 202 Miss. 808, 32 So. 2d 133 (1947); Eastman, Gardiner & Co. v. Hinton, 86 Miss. 604, 38 So. 779 (1905); Harvey v. Briggs, 68 Miss. 60, 8 So. 274 (1890).

[32] Nichols v. Gaddis & McLaurin, Inc., 222 Miss. at 234, 75 So. 2d at 635.

[33] 86 Miss. 604, 38 So. 779 (1905).

[34] Nichols v. Gaddis & McLaurin, Inc., 222 Miss. at 231, 75 So. 2d at 633.

[35] *Id.* at 226, 75 So. 2d at 631. *See also* Note, *Real Property-Adverse Possession of Cotenant*, 27 Miss. L.J. 72 (1955).

[36] Nichols v. Gaddis & McLaurin, Inc., 222 Miss. at 229, 75 So. 2d at 632-33 .

> (1895), 'No one is required to watch the clerk's office to see that those in possession of property in privity with him or in subordination to his title are not acquiring rights adverse to him.'[37]

Both *Peeples* and *Nichols* ostensibly announced the same general rule. *Peeples* merely stated "an evidential test as to the quantum and weight of evidence to be considered in determining . . . when the period of adverse possession begins to run."[38] The confidential, fiduciary nature of the relationship between cotenants is ignored when merely a recorded deed to the fee is said to be notice of a hostile claim to the common property.[39] *Nichols*, in rejecting such an extreme, evidential test, placed Mississippi more firmly within the general rule which *Peeples* had acknowledged, but with which *Peeples* was difficult to reconcile.

III. Exceptions to the Requirement of Actual Notice

In those situations in which the adverse claimant is not an avowed cotenant but is a stranger in possession of the common property claiming under a deed purporting to convey the entire property, the courts usually find that the stranger-grantee has obtained title by adverse possession even though he has not met the standard of notice imposed on an avowed cotenant.

Different reasons are given for this variance. One is the theory that no fiduciary relationship of cotenancy whatever exists between the stranger-grantee and his grantor's cotenants; therefore, he is under no duty to give actual notice of any claims adverse to the other cotenants. The acceptance of the fee simple deed and the exclusive possession of the land thereunder is viewed as a complete repudiation of any concept of cotenancy, and the stranger's acts of dominion are manifestly adverse to the other cotenants.[40]

Another reason advanced is that even though the stranger-grantee does become a cotenant in law with the non-participating cotenants, he is not such in fact and can avail himself of a well-recognized exception to the general rule requiring actual notice. Under this exception the notice requirement is satisfied by the constructive notice given the other cotenants by the contents of the deed and the stranger's possession thereunder. More specifically, the other cotenants are charged with notice of the fact that someone other than their original cotenant is now in exclusive possession of the land, and they are also charged with notice of the character of his claim as indicated by the conveyance under which he claims.[41]

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[37] *Id.* at 231, 75 So. 2d at 633.

[38] *Id.* at 232, 75 So. 2d at 634.

[39] *Id.* at 221, 75 So. 2d at 629.

[40] 4 H. TIFFANY, REAL PROPERTY § 1135 (3d ed. 1939). *See generally* Note, *Real Property-Adverse Possession-Between Cotenants*, 56 MICH. L. REV. 1360 (1958); Note, *Notice: Adverse Possession: Requirements of Adverse Possession Against Tenant in Common*, 15 OKLA. L. REV. 474 (1962); Note, *Tenancy in Common-Conveyance of Whole-Adverse Possession*, 12 TEXAS L. REV. 106 (1933).

[41] 4 H. TIFFANY, *supra* note 40, § 1135.

An early case, *Eastman, Gardiner & Company v. Hinton*,[42] indicated that Mississippi at that time accepted the transaction as creating no cotenancy. In that case the stranger-grantee entered the property and possessed it for well over ten years under his deed, which allegedly conveyed the fee. The Supreme Court of Mississippi held that the stranger had obtained sole title to the property even though no actual notice was given to the non-participating cotenants and even though the deed had been recorded less than ten years before the institution of the original suit. The court said:

> Adverse possession in this class of cases does not depend upon actual notice. The principle which requires actual notice, or acts of repudiation equivalent thereto, applies only to cases where there is some relation between the occupant and the holder of the legal title, which imposes upon the occupant the obligation of giving notice . . . as a condition precedent to the assertion of any hostile claim by him.[43]

This case was termed one in which there was no question of "an attempt on the part of any co-tenant or any person who ever occupied the relation of co-tenant"[44] to advance any adverse claim.

On similar facts, in *Davis v. Gulf Refining Company*,[45] the court was not as explicit in stating that no cotenancy existed. Nevertheless, it stated:

> [T]he execution and recording of the warranty deed by the cotenants to a stranger to the title . . . set in motion an adverse claim . . . which was thereupon made available to the grantee, who, by implementing this claim by actual adverse possession . . . for a period beyond the statutory limitation, matured the disseisin into complete ownership.[46]

Subsequent decisions[47] in Mississippi indicate that the court has moved away from the position that the relationship of cotenancy is not created when a stranger receives a deed purporting to convey the fee from an avowed cotenant. Yet only *Wilder v. Currie*[48] directly casts any doubt on the conclusion drawn from these cases that Mississippi continues to recognize the exception to the general rule in cases of this class. The court, in *Wilder*, determined the stranger-grantee to be a cotenant in the property, and thus he had to impart actual notice to his cotenants of his adverse claims before they could be ousted. In so holding, the court did not comment on the hithertofore recognized

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[42] 86 Miss. 604, 38 So. 779 (1905).

[43] *Id.* at 617, 38 So. at 782.

[44] *Id.* at 615, 38 So. at 781.

[45] 202 Miss. 808, 32 So. 2d 133 (1947).

[46] *Id.* at 817, 32 So.2d at 135-36.

[47] Reed v. Bales, 240 Miss. 592, 128 So. 2d 374 (1961); Huddleston v. Peel, 238 Miss. 798, 119 So. 2d 921 (1960); Bush v. Quinn, 236 Miss. 895, 112 So. 2d 231 (1959); Wilder v. Currie, 231 Miss. 461, 95 So. 2d 563 (1957); Avera v. Turner Lumber Co., 230 Miss. 123, 92 So. 2d 458 (1957).

[48] 231 Miss. 461, 95 So. 2d 563 (1957).

exception to the notice requirement espoused in *Eastman, Gardiner & Company* and the other cases of that class but looked instead to the language of *Nichols*.[49] By regarding *Nichols* as controlling, the court, in this writer's opinion, construed the principles announced in that case as more broadly applicable than a close reading of the case will justify. Engrafting those principles onto the cases in which a stranger-grantee of a cotenant's deed makes a physical entry onto the land and exclusively possesses it thereunder, obliterates the distinction between a stranger and an avowed cotenant recognized in this state since *Harvey v. Briggs*[50] and acknowledged in *Nichols* itself when the court determined *Eastman, Gardiner & Company* not to be applicable.[51]

To reiterate, *Nichols* repudiated the evidential test of *Peeples* which equated a recorded deed with actual notice; it did not deal with the question before the court in *Wilder*. In *Reed v. Bales*[52] the court moved away from the language of *Wilder* and back toward recognition of the exception to the general rule, when it stated:

> This Court has held in several cases that, when one tenant in common of land conveys the whole estate in fee, with covenants of seizin and warranty, and the grantee enters and holds exclusive thereof, such entry and possession are a disseizin of the cotenant.[53]

Nichols was found not to control this type of case because it "was decided on facts entirely different."[54]

Wilder seems to be out of harmony with the principles announced in cases decided both before and after it. The tendency, however, to apply *Nichols* in that class of cases involving strangers is visible again to some extent in *Quates v. Griffin*.[55]

IV. Quates v. Griffin

The third-party grantee in *Quates* was adjudged to have been no stranger to the title,[56] but a cotenant both in law and in fact because he either was or should have been aware of the cotenancy status between his grantor and others at the time of the purchase.[57] What is interesting, however, is that the court implied that even if he had been determined a stranger, he could not have had sole title vested in him because there was no showing that he gave actual notice of his claims to his cotenants in law. This inference arises from almost the same interpretation the court gave to the effect of the *Nichols* decision in *Wilder*.

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[49] *Id.* at 481, 95 So. 2d at 570.

[50] 68 Miss. 60, 8 So. 274 (1890).

[51] Nichols v. Gaddis & McLaurin, Inc., 222 Miss. at 231, 75 So. 2d at 633.

[52] 240 Miss. 592, 128 So. 2d 374 (1961).

[53] *Id.* at 600, 128 So. 2d at 377.

[54] *Id.* at 602, 128 So. 2d at 378.

[55] 239 So. 2d 803 (Miss. 1970).

[56] *Id.* at 807.

[57] *Id.* at 808.

> The case of Peeples v. Boykin, 132 Miss. 359, 96 So. 177 (1923) formerly afforded a grantee who was a stranger to the title some comfort against unknown claimants since the recordation of an instrument purporting to convey the entire property gave notice to the world, including cotenants, of the claims of the grantee, and if followed by adverse possession for the statutory period, full title became vested in the adverse holder. This case, however, has been overruled in the much-discussed and controversial case of Nichols v. Gaddis & McLaurin, Inc., 222 Miss. 207, 75 So. 2d 625 (1954), leaving a stranger grantee to the title, the almost impossible burden in cotenancy cases of affirmatively proving by clear and convincing evidence that the other cotenants out of possession had actual knowledge of his claim to the entirety of the property. . . .[58]

This statement completely ignores the principles announced in a line of cases dealing with factual situations involving a stranger entering the common property under a purported deed to the fee and indicates that the court again views *Nichols* as determinative of the question of whether a stranger need give actual notice. But this conclusion is contradicted by the fact that the court devotes considerable effort to establishing that the adverse holder, Griffin, was not a stranger after the court had implied it would make no difference as far as Griffin's claims were concerned. In finding Griffin not to be a stranger, the court stated his position to be:

> [E]xactly the antithesis of that set forth in Reed v. Bales, 240 Miss. 592, 128 So. 2d 374 (1961). In this case the Court determined Bales to be a stranger to the title. . . .[59]

Reed, of course, had also said that *Nichols* was not controlling in cases of its class, but the court made no comment on that point. The tendency to see *Nichols* as controlling this type of case, together with the language in *Nichols* to the effect that a recorded deed is not actual notice of an adverse claim to cotenants out of possession, might offer some explanation for the court's impression that it was necessary to overrule *Nichols* before announcing the new rule that a stranger could oust the non-participating cotenants by recording his deed to the entire property and possessing that property for the statutory period. As this writer has repeatedly suggested, however, *Nichols* stands simply for the proposition that a recorded deed, standing alone, is not actual notice. It is not antagonistic to those cases in which constructive notice was based on a visible change in the character of ownership of the land, not merely on the stranger-grantee's recorded deed.

V. Conclusion

The rule announced in *Quates* is certainly a reasonable one. It provides legal predictability in the type of cases to which it is applicable, and this is undoubtedly necessary to provide good faith purchasers of land some degree of protection against claims of others holding

[58] *Id.* at 807.

[59] *Id.* at 809.

undivided interests in the land which are not advanced until years after the conveyance. The courts are faced with numerous such disputes where the ownership is distributed among many minute interests. Often the cotenant in possession is oblivious to even the existence of some of his co-owners. They, in turn, deriving their titles through inheritance from long-forgotten ancestors, are often unaware of the existence of their interests. As it was succinctly stated by the court, often only the "smell of oil"[60] in previously valueless land rekindles an interest in its ownership. The difficulty faced by the court in balancing the loss of title acquired by inheritance with that gained through adverse possession is not of easy solution.[61]

Still, the *Quates* rule is limited in its applicability to a stranger-grantee possessing land under a recorded deed executed by one or more cotenants purporting to convey the entire property.[62] In this writer's opinion such a rule could consistently have been found on the authority of that line of cases extending from *Eastman, Gardiner & Company v. Hinton,* through *Davis v. Gulf Refining Company* to *Reed v. Bales* without the need for any reference to *Nichols v. Gaddis & McLaurin, Inc.*

With *Nichols* overruled, the question can legitimately be raised whether the court, in addition to establishing an explicit rule on notice in regard to stranger-grantees, has by implication re-instated the often criticized *Peeples* evidentiary test in regard to notice imparted by avowed cotenants. Since both cases agreed on the necessity for actual notice, with *Nichols* simply rejecting the *Peeples* test as to whether that requirement had been met, it would seem logical to say that by overruling *Nichols* only to the extent it had overruled *Peeples,* the Mississippi Supreme Court has in fact re-established the *Peeples* standard. If this is the case, the law dealing with the requirement of notice in adverse possession disputes between cotenants will be curiously reversed. An avowed cotenant will be confronted with a lesser standard of *de facto* notice to be met than that confronted by a stranger-claimant; for, in the former case a recorded deed alone constitutes notice of hostile claims, while in the latter case a recorded deed conveying the entire estate must be coupled simultaneously with the additional signal to the non-participating cotenants of some adverse claim afforded by the actual entry of the stranger onto the land. Clarification of this point must, necessarily, await future litigation.

Stephen O. Moore

Confidential Relationships and Undue Influence in Wills in Mississippi

I. Introduction

While the legislatures of all common law jurisdictions have granted their citizens the right to exercise a broad spectrum of control over the post mortem distribution of their real and personal property,[1] the

[60] *Id.* at 807.

[61] *Id.*

[62] *Id.* at 811.

[1] *See, e.g.,* Miss. Code Ann. § 657 (1956).

duty of protecting these citizens from persons seeking to displace the testamentary scheme of the testator with a scheme of their own has devolved upon the judiciary.[2] Concomitant with enforcement of this duty is the rule that a disposition is void if procured by an influence destroying the free agency of the testator and substituting another's volition for his own. Such disposition is deemed to be procured by undue influence.[3]

Where the testator is under the domination of another or is justified in believing that the other will not act in a manner inconsistent with his (testator's) welfare, and a confidential relationship exists,[4] any testamentary gift in Mississippi to the dominant party when he has been "actively concerned in some way with the preparation or execution of the will, or where the relationship is coupled with some suspicious circumstances,"[5] is prima facie void.[6]

Such circumstances give rise to a presumption of undue influence, and the burden is shifted to the beneficiary to disprove the existence of this influence by "clear and convincing evidence"[7] of (a) good faith in the beneficiary's dealings with the testator, (b) testator's full knowledge of his rights under the circumstances, and (c) independent advice and counsel of a third party devoted wholly to the interests of the testator.[8]

The source of this presumption is not to be found in any Mississippi statutory provisions; rather, it has evolved from a line of Mississippi decisions dating back to the 1858 case of *Meek v. Perry*[9] with its extensively researched opinion by Justice Harris.

II. The Early Rule: Meek v. Perry

In *Meek v. Perry* the testatrix and her sister, Mary, were the wards of their uncle, Michael McKinnie. Shortly after McKinnie's appointment as guardian for the sisters, Mary, not yet fourteen years old, eloped with and married B.R. Perry. There was considerable testimony that testatrix was very displeased with her sister's action. She regarded

[2] Note, *Undue Influence in Wills*, 7 ARK. L. REV. 116 (1953).

[3] T. ATKINSON, LAW OF WILLS § 55, at 255. (2d ed. 1953). *See also* J. EATON, EQUITY JURISPRUDENCE § 133 (1901); W. PAGE, LAW OF WILLS §§ 29.77-29.134 (Bowe-Parker ed. 1960); Annot., 19 A.L.R.3d 575 (1968); Annot., 13 A.L.R.3d 381 (1967); Green, *Fraud, Undue Influence and Mental Incompetency*, 43 COLUM. L. REV. 176 (1943); Hutton, *Undue Influence and Fraud in Wills*, 37 DICK. L. REV. 16 (1932); Spracher, *Undue Influence*, 16 MARQ. L. REV. 130 (1931); Warren, *Fraud, Undue Influence and Mistake in Wills*, 41 HARV. L. REV. 309 (1927); Note, *Wills—When Undue Influence Becomes a Jury Question*, 30 IOWA L. REV. 321 (1944); Comment, *Wills—Undue Influence*, 50 MICH. L. REV. 748 (1951).

[4] Green, *Fraud, Undue Influence, and Mental Incompetency*, 43 COLUM. L. REV. 176, 180 (1943).

[5] Croft v. Alder 237 Miss. 713, 723-24, 115 So. 2d 683, 686 (1959).

[6] Meek v. Perry, 36 Miss. 190 (1858).

[7] Croft v. Alder, 237 Miss. at 723, 115 So. 2d at 686.

[8] Ham v. Ham, 146 Miss. 161, 110 So. 583 (1926).

[9] 36 Miss. 190 (1858).

Perry with aversion, considered him unworthy of trust or confidence, and maintained this opinion until her death. There was further proof that testatrix believed Perry married her sister for her property, that he was a profligate, and that he would waste the property. There was no proof that McKinnie had taken any action which would prejudice testatrix against her sister or her brother-in-law.[10]

In April, 1854, it became obvious that testatrix, only eighteen years old, was rapidly dying of tuberculosis. Four days before her death, testatrix requested that her uncle summon Dr. Hibbler, an old friend of the family. The doctor was obtained, and to him testatrix dictated her will "in a manner exhibiting the highest degree of deliberation and intelligence."[11]

Under this will certain property would have passed to testatrix' uncle and guardian, McKinnie,[12] to be held in trust for the children of Mary until they married or reached majority; should the children die without bodily heirs, the property would revert to McKinnie.[13]

McKinnie's only direct participation in the preparation or execution of the will was in summoning—at testatrix' request—Dr. Hibbler. McKinnie was present at neither the dictation nor the execution of the will.[14]

On an issue of *devisavit vel non* certified to the circuit court, the jury returned a verdict denying the validity of the will, and the probate court entered its decree accordingly.

In reaching the decision to affirm the circuit court's action, Justice Harris, speaking for the majority of the Supreme Court, began with the basic common law premise that guardians cannot become the beneficiaries of their wards' bounty.[15] The reason given for this principle was that:

> [It] was the policy of the law, founded on the safety and convenience of mankind; a shield against advantages taken by persons, in situations of confidence, preventing acts of bounty, which, in other situations, might have effect.[16]
>
> It would give an opportunity, either by flattery or force, by good usage unfairly meant, or by bad usage imposed, to take such advantage; and, therefore, the principle of the court is of the same nature [as the equitable relief granted by] this court, on the head of public utility. . . . *All depends upon public utility*. . . . (emphasis by the court).[17]

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[10] *Id.* at 223.

[11] *Id.* at 224.

[12] Six slaves. *Id.* at 192.

[13] The entire will is set out in 36 Miss. at 192.

[14] Meek v. Perry, 36 Miss. at 203.

[15] *Id.* at 245, *citing with approval* the English cases Hatch v. Hatch, 9 Vez. Jr. 292 (1804); Hylton v. Hylton, 2 Vez. Jr. 547 (1754); Osmond v. Fitzroy, 3 Pr. Wms. 129 (1731); The Duke of Hamilton v. Lord Mohun, 1 Pr. Wms. 118 (1703).

[16] Meek v. Perry, 36 Miss. at 247.

[17] *Id.* at 248, *quoting* Lord Chancellor Hardwicke in Hylton v. Hylton, 2 Vez. Jr. 547 (1754).

Therefore, according to the cases cited by the court, the rule in England was that:

> [A] court of equity upon grounds of public policy will set aside any gift made by a ward to his guardian, during the continuance of the guardianship . . . upon the presumption of law that it was obtained by 'undue influence.'[18]

Having determined that in England the above rule made the presumption of undue influence conclusive, Justice Harris then traced the subject through the then-leading American authority on the matter, *Story on Equity Jurisprudence*, and deduced that American jurisdictions treated the legal presumption of undue influence as prima facie evidence, but rebuttable:[19]

> The relation [of guardian and ward] imposes a general disability to deal with each other. But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardian and ward to stand, unless the circumstances demonstrate, in the highest sense of the terms, the *fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian.* For in all such cases the *relation* is still considered as having *an undue influence* upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased. (emphasis added).[20]

Justice Harris then stated that this doctrine is not limited to the confidential relationship found in guardian and ward cases; rather, it is one of general application to relations existing among adults as well as children, including the relations of attorney and client, principal and agent, trustee and cestui que trust.[21]

Noting that the authorities he cited for this doctrine were all cases involving *inter vivos* transactions, Justice Harris reasoned that because it is on grounds of public policy that the law will presume undue influence in the situations to which he referred, there is no sound basis for denying application of the doctrine to testamentary transfers:

> If the principle be irrespective of conduct or motive, of active participation or passive silence. . . , what matters it, whether the *form* of the conveyance be by deed or will? (emphasis added).[22]

Satisfied that the presumption of undue influence was applicable to the instant case, the court held that the circuit court did not err when it instructed the jury that they must find against the validity of testatrix' will unless there was demonstrated full deliberation on

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[18] Meek v. Perry, 36 Miss at 250.

[19] *Id.* at 250.

[20] *Id.* at 252.

[21] *Id.* at 253.

[22] *Id.*

the part of the ward-testatrix and abundant good faith on the part of the guardian-beneficiary.[23]

The majority's opinion failed to satisfy Justice Handy, who pointed out in his dissenting opinion[24] that this doctrine, while serving as a rule of expediency, runs counter to the rule that fraud and bad faith are not to be presumed. More importantly, he maintained that the force of the rule actually fails when it is applied to cases where the parties have not dealt together, where no transaction has taken place between them, or where the beneficiary has not been active in procuring the act which conferred the benefit, because, not being a party to the transaction, he could hardly be expected to explain the attending circumstances. "To apply the rule to such a case, would be almost inevitably to condemn the act absolutely . . . upon the unjust reason . . . that he acted unfairly in a matter to which he was not a party."[25]

By Justice Handy's standards, the true rule is that:

> [T]he mere existence of the relation of guardian and ward, together with the fact, that the guardian is a beneficiary under the will, are circumstances to be considered by the jury, as tending to show undue influence on the part of the guardian in obtaining its execution, *provided there be other evidence* tending to show undue influence . . . continuing at the time of its execution, destroying the free agency of the ward . . . and tending to show that the will was not the unconstrained act of the ward, and [his] free and voluntary will. But the existence of that relation is not sufficient of itself to condemn the will, or to render it incumbent on the guardian to show that no undue influence, fraud or constraint, was employed by him in obtaining its execution. (emphasis added).[26]

For the next 75 years the rule of *Meek v. Perry* lay dormant upon the shelves of Mississippi law libraries, its soundness being questioned only once during that time.[27] On that occasion Chief Justice Whitfield reaffirmed the rule with the perfunctory statement: "[W]e do not feel warranted in overruling [*Meek v. Perry* . . . indeed,] we think it is correct."[28]

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[23] *Id.* at 258-59.

[24] *Id.* at 265-73.

[25] *Id.* at 267.

[26] *Id.* at 269-70.

[27] Hitt v. Terry, 92 Miss. 671, 46 So. 829 (1908). Validity was denied a will which, after paying specific legacies, would have passed $20,000 to Dr. Hitt. The will was drafted by Hitt, a confidential friend, adviser, and personal physician of the testator, on testator's alleged proposal (admitted by Hitt) that as consideration of Hitt's accompanying him on a trip to Baltimore, he would pay Hitt's expenses and reasonable compensation *if he* (testator) *survived the trip. If he died prior to returning* from Baltimore, Hitt was to have the estate, less the charges set forth in the will. Chief Justice Whitfield properly remarked that this arrangement was "[c]ertainly a most extraordinary [one] . . . according to the terms of which it would, manifestly, be to the interest of the physician that the patient should die." *Id.* at 701-02, 46 So. at 836.

[28] *Id.* at 711, 46 So. at 840.

III. Additional Requirements: Proof of Independent Consent and Action

To the requirements of full deliberation and abundant good faith announced in *Meek v. Perry*, a third element was added by the 1926 case of *Ham v. Ham*.[29]

C. M. and Eugene Ham were brothers by nature and partners by law. In 1905 C. M. executed a will devising all his property to his brothers and sisters. In 1924, his health failing but his love and admiration for Eugene continuing, C. M. executed a deed conveying nearly all his property to Eugene, in consideration for his brother's paying him $250 monthly for life in addition to paying his medical and funeral expenses.[30]

The court found that a fiduciary relationship existed between the brothers:

> [T]he principle [of fiduciary relationships] extends to every possible case . . . in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The relation and duties involved in it need not be legal, it may be moral, social, domestic, or merely personal.[31]

It then adopted the rule:

> [W]hen such a relation exists, and the parties thereto 'consciously and intentionally deal and negotiate with each other . . . and there results from their dealing some conveyance or contract or gift . . . the principle literally and directly applies. The transaction is not necessarily voidable . . . but a presumption of its invalidity arises which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action.' . . . [P]robably the only way [independent consent and action] can be clearly proven, is by showing that in making the deed the grantor acted on the advice of a competent person, disconnected from the grantee and devoted wholly to the grantor's interest.[32]

Applying this rule and its test to the facts present, the court found that the evidence failed to disclose that when C. M. Ham executed the deed to Eugene Ham he had full knowledge of the value of the property conveyed, and of the relation of the consideration exchanged, nor was it established that it was executed of his own independent consent and action.

To summarize, in *Meek v. Perry* a rule formerly applicable only to *inter vivos* transactions between parties to a confidential relationship was applied to derive a presumption of undue influence when the dominant party of the relationship is a principle beneficiary of the servient

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[29] 146 Miss. 161, 110 So. 583 (1926).

[30] *Id.* at 170, 110 So. 583.

[31] *Id.* at 173, 110 So. at 584, *citing with approval* 2 J. POMEROY, EQUITY JURISPRUDENCE §§ 956-60 (4th ed. 1918).

[32] *Id.* at 174, 110 So. at 584-85.

party's will. To overcome that presumption the court required evidence of the testator's full deliberation and the beneficiary's abundant good faith. In *Ham v. Ham* the court applied the *Meek v. Perry* rule to an *inter vivos* transaction but, to overcome the presumption of undue influence, added the requirement of proof of independent consent and action as shown by ample advice from a competent person devoted wholly to the grantor's interest.

IV. Extension of Ham Test to Testamentary Transfers

Whether the *Ham v. Ham* rule regarding *inter vivos* transactions would be applied to testamentary dispositions was unsettled until 1959, when Barney Alder failed to discharge the burden of showing that his uncle's will was not the product of undue influence.[33]

John Alder's last few years of life were marked with an increasingly more feeble mind and with recurring illnesses requiring frequent hospitalization and surgery. During John's last three years he received frequent assistance in his business and personal affairs from his nephew, Barney Alder. During one period of his uncle's illness Barney had an attorney draft a will naming him beneficiary of 50% of John's estate. The terms of this instrument revoked John Alder's prior will devising only 20% of his estate to Barney; further, Barney's share was considerably larger than the shares provided for John's brother and sister, but the new instrument stated that this disparity of bequests was attributable to Barney's having provided care and assistance to the testator during his times of need.[34] The will was executed in John's hospital room and was attested by Barney, the attorney-draftsman, and one other witness.[35]

Because of the existence of the confidential relationship between Barny and John Alder and because of Barney's active participation in the preparation and execution of his uncle's will, the court declared John Alder's second will void. In so doing, the court applied the rule that where the beneficiary has been actively concerned with the preparation or execution of the will, or where the relationship is coupled with some suspicious circumstances, such as mental infirmity of the testator, the will is presumed to be the product of undue influence, which requires satisfaction of the three-element rule formerly applied only to *inter vivos* transactions. That rule, as stated in *Ham v. Ham*, requires clear evidence of (1) good faith, (2) full knowledge, and (3) independent consent and action as shown by ample advice from a competent person disconnected from the grantee (beneficiary) and devoted wholly to the grantor's (testator's) interest.[36] Barney Alder was unable to meet this burden of rebutting the presumption of undue influence.[37]

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[33] Croft v. Alder, 237 Miss. 713, 115 So. 2d 683 (1959).

[34] *Id.* at 721, 115 So. 2d at 685.

[35] *Id.* at 728, 115 So. 2d at 688-89.

[36] *Id.* at 726-27, 115 So. 2d at 688.

[37] For the most concise and lucid discussion of the burdens of proof and the "shifting" of the burden in wills cases in Mississippi, see Smith, *"Where There Is a Will, There Is a" . . . Burden of Proof*, 14 MISS. L.J. 103 (1941).

V. In Re Will of Moses

One hundred years after its appearance the rule in *Meek v. Perry*, as modified in *Ham v. Ham*, was still the law in Mississippi, and it appeared that Justice Handy's reasons for distrusting the rule in 1858 were hastily made.[38] However, while Barney Alder was taking care of his uncle, one Clarence Holland was entering into a confidential relationship coupled with suspicious circumstances with a Mrs. Fannie Moses.[39]

Although it was not shown how long Holland, an attorney, had been acquainted with Mrs. Moses, the testatrix, there was evidence tending to prove that they had been very good friends for a number of years prior to her death.[40] The court found that Holland, as an attorney, entered into a fiduciary relationship with Mrs. Moses sometime prior to 1961, when she executed a will (not in issue here) bequeathing certain personalty to Holland.[41]

In 1962 Holland became a tenant in common with Mrs. Moses in a $36,000 tract of land Holland purchased with money belonging to the testatrix. Additionally, she authorized Holland to draw checks on her personal and special checking accounts, for which she was the sole depositor. Holland drew two checks on the special account: one check for $835, purportedly in payment for a tractor, was made payable to Holland's brother; the other check for $2100, for an undisclosed number of cattle, was made payable to Holland's father.[42]

In 1964 Mrs. Moses executed a final will, which became the subject of the present suit. By that instrument Holland was named principal beneficiary of her estate, valued at $125,000. The chancellor ruled that this will was the product of Holland's undue influence and was not entitled to be admitted to probate. The supreme court affirmed:

> The evidence supports the chancellor's finding that the confidential or fiduciary relationship which existed between Mrs. Moses and Holland . . . was a subsisting and continuing relationship, having begun before the making . . . of the [1961] will . . . and having ended only with Mrs. Moses' death. Moreover, its effect was enhanced by the fact that throughout this period, Holland was in almost daily attendance upon Mrs. Moses on terms of the utmost intimacy. There was strong evidence that this aging woman,[43] seriously ill, disfigured by surgery,[44] and hopelessly addicted to alcoholic excesses, was completely bemused by the constant and amorous attentions of Holland, a man 15 years her junior. There was testimony

[38] Meek v. Perry, 36 Miss. at 265-73.

[39] *In re* Will of Moses, 227 So. 2d 829 (Miss. 1969).

[40] *Id.* at 832.

[41] *Id.* at 832-33.

[42] *Id.* at 832.

[43] Mrs. Moses died at the age of 57. *Id* at 831

[44] Mrs Moses suffered from serious heart trouble and cancer had required a mastectomy. *Id.*

> too, indicating that she entertained the pathetic hope that he might marry her. . . . [The chancellor] was correct in his conclusion of law that such relationship gave rise to a presumption of undue influence which could be overcome only by evidence that, in making the 1964 will, Mrs. Moses had acted upon the independent advice and counsel of one entirely devoted to her interest.[45]

The independent advice and counsel Mrs. Moses obtained came from "a reputable and respected member of the bar, who had no prior connection with Holland and no knowledge of Mrs. Moses' relationship with him. He had never seen nor represented Mrs. Moses previously and never represented her afterward."[46]

This attorney testified that when Mrs. Moses came to his office for advice on making her will, she was alone, alert, intelligent, rational, knew exactly what she was doing, and exhibited no indication of outside influence. When questioned as to the extent he tried to influence Mrs. Moses in drafting her will, the witness answered:

> I didn't try to influence her at all. I asked her about the property and . . . her marital background, because I needed to know whether or not there would be a spouse who might have renunciation rights, and I needed to know if she had children and . . . whether or not she wanted to pretermit them [if any]. I wanted to know the general value of the properties so that I could advise her as to whether or not she might have an estate tax problem, and I ascertained that she probably did have and so advised her, but she said that it didn't matter to her, that *this was the way she wanted to leave the property, so I drew the will in accordance with her specific directions.* (emphasis by the court).[47]

Of the sufficiency of this independent advice by one devoted wholly to Mrs. Moses' interest, the court was unimpressed:

> [There was no] inquiry or discussion as to a possible client-attorney relationship with Holland. . . .
>
> . . . .
>
> [N]owhere in the conversations with Mrs. Moses was there touched upon in any way the proposed testamentary disposition whereby preference was to be given a nonrelative to the exclusion of her blood relatives. There was no discussion of her relationship with Holland, nor as to who her legal heirs might be, nor as to their relationship to her, after it was discovered that she had neither a husband nor children.
>
> [I]n writing the will, the attorney-draftsman did no more than write down, according to the forms of law, what Mrs. Moses

---

[45] *Id.* at 832-33.

[46] *Id.* at 833.

[47] *Id.* at 841.

> told him. *There was no meaningful independent advice or counsel . . . and it is manifest that the role of the attorney in writing the will . . . was little more than that of scrivener.* (emphasis added).[48]

> There is no sound reason supporting the view that a testator, whose will has become subservient to the undue influence of another, is purged of the effects of that influence merely because the desired testamentary document is prepared by an attorney who knows nothing of the antecedent circumstances.[49]

Justice Robertson's vigorous dissent[50] maintained that the presumption of undue influence did not arise in this case because:

> [T]he suspicious circumstances listed by the chancellor . . . had nothing whatsoever to do with the preparation of the will. These were remote antecedent circumstances having to do with the meretricious relationship of the parties, and the fact that . . . Mrs. Moses . . . could be termed an alcoholic . . . . The fact that she chose to leave most of her property to the man she loved in preference to her sisters and brother is not such an unnatural disposition of her property as to render it invalid.[51]

He also took sharp issue with the majority's holding that the efforts of the attorney-draftsman amounted to no more than that of mere scrivener:

> He ascertained that Mrs. Moses was competent to make a will; he satisfied himself that she was acting of her own free will and accord, and that she was disposing of her property exactly as she wished and intended. No more is required.[52]

As Justice Robertson pointed out,[53] when Mrs. Moses executed the 1964 will, she had deliberated fully on the matter; she knew exactly what she was doing; and the instrument had been expertly prepared by an experienced and competent attorney devoted wholly to her interest and who had no connection whatsoever with Holland. "If full knowledge, deliberate and voluntary action, and independent consent and advice have not been proved in this case, then they just cannot be proved."[54]

VI. Conclusion

Our court, in *In re Will of Moses*, has failed to distinguish undue influence from fraud. When there exists a confidential or fiduciary relationship, and the parties thereto deal and negotiate with each other,

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[48] *Id. at* 833-34.
[49] *Id.* at 836.
[50] *Id.* at 838-43.
[51] *Id.* at 840.
[52] *Id.* at 842.
[53] *Id.* at 843.
[54] *Id.*

and when there results from their dealings a conveyance or gift, either testamentary or *inter vivos*, by operation of law a presumption of undue influence attaches to that conveyance or gift. But this presumption is not conclusive; it can be rebutted by clear and convincing evidence of abundant good faith on the part of the recipient and of full knowledge of his rights under the circumstances by the grantor, as shown by ample independent advise of a competent person devoted wholly to the grantor's interest and disconnected from the beneficiary.

If the beneficiary fails to overcome this legal presumption the will or conveyance fails. If he effectively rebuts the presumption, the burden shifts to the party attacking the transaction to attempt to defeat it by some other means, most notably, by proof of fraud. But, as Justice Handy stated in his dissenting opinion in *Meek v. Perry*,[55] neither fraud nor bad faith will be presumed.

It is submitted that courts in fact presume fraud, or bad faith, or both, when they presume conveyances between parties in confidential or fiduciary relationships to be void because of the existence of antecedent immoral or meretricious activities of which the courts disapprove on general principles. Such activities are more properly treated as elements tending to prove fraud in the inducement rather than undue influence.

Arlen B. Coyle

[55] 36 Miss. at 265-73.

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